Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell	)	
Infrastructure by Improving Wireless	)	WT Docket No. 16-421
Facilities Siting Policies;	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	
	)	

COMMENTS OF
THE WIRELESS INFRASTRUCTURE ASSOCIATION

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SUMMARY

While the Commission has made important strides toward lowering barriers to wireless infrastructure deployment, WIA's members continue to face significant obstacles that effectively thwart the deployment of small wireless facilities and equipment in public rights-of-way. Members increasingly experience significant delays, unclear and inconsistently applied local processes, burdensome requirements and limitations, moratoria, and arbitrary and exorbitant fees when attempting to site these facilities. WIA urges the Commission to take action in this proceeding to clarify and bolster its previous orders interpreting Sections 253 and 332 of the Telecommunications Act of 1996 ("1996 Act"),[1] and to guide local governments to act in a competitively neutral and nondiscriminatory manner to foster enhanced competition, as was the purpose of the 1996 Act.

Specifically, the Commission should reconcile inconsistent interpretation and enforcement of Section 253(a) by issuing a declaratory ruling that explicitly states that Section 253(a) is not limited to outright prohibitions on service, but is violated by any state or local requirement that: (a) "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment;" or (b) imposes requirements that in combination or as a whole impede the provision of any telecommunications service, including, but not limited to, requirements that grant local governments unfettered discretion over applications and requirements imposing lengthy or onerous application processes. In so doing, the Commission should clarify that to violate Section 253(a) a local government requirement need not be "insurmountable" or make it completely impossible to provide telecommunications services. A declaration by the Commission in this regard would simply

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

reinforce the cases decided by the Commission and the courts shortly after passage of the 1996 Act, which had correctly reflected the intention of Congress to allow any entity to compete in a fair and balanced regulatory environment. Those decisions have been eroded by recent decisions that take an improperly narrow view of Section 253 and undermine competition. As the expert agency empowered to interpret and enforce the Communications Act, the Commission should take action to resolve the ambiguity created by these recent decisions and declare that they are incorrect.

Further, the Commission should explicitly declare that imposition of regulations and requirements on small wireless facility deployments that are not imposed on other telecommunications equipment installed on poles in the public rights-of-way are a barrier to entry, and that such discriminatory imposition of requirements is not a reasonable or competitively neutral and nondiscriminatory management of the public rights-of-way. When seeking to deploy small wireless facilities in the public rights-of-way, WIA members are repeatedly faced with processes, requirements, limitations, and fees that are not imposed on other telecommunications providers (or even electric utilities) that install similar facilities in the public rights-of-way. The Commission should act to put an end to such discrimination that is antithetical to the intent of the 1996 Act.

The Commission should also declare that local government requirements that seek to exercise unfettered discretion over whether a small wireless facility network is deployed also have the effect of prohibiting telecommunications service and are not within local governments' Section 253(c) authority to manage the public rights-of-way. Notably, WIA members are increasingly required to obtain zoning approval for their small wireless facilities, a process that involves wholly discretionary and often politically motivated decision-making. Even where

zoning approval is not required, and sometimes in addition to zoning approval, some local governments seek to impose burdensome requirements and restrictions on small wireless facilities that do not apply to other right-of-way occupants. Local governments should not have unfettered discretion to pick and choose which companies and technologies will be able to deploy facilities and provide services.

Further, the Commission should make clear that unreasonable delay is a prohibition of telecommunications service in violation of Section 253 in addition to violating Section 332(c)(7)(B)(ii). In so doing, the Commission should clarify its *Shot Clock Order* to hold that the maximum reasonable time period for a local government to act on an application to install small wireless facilities is 60 days. Given that the size and appearance of small wireless facility equipment is no different (and sometimes smaller) than the equipment already deployed on utility poles throughout public rights-of-way, and that such other equipment is routinely permitted "over the counter" in a matter of days, there is no basis for local authorities to claim that review of small wireless facility deployments requires lengthy and burdensome applications and reviews. Declaring that 60 days is the maximum reasonable time period for a local government to act on a small wireless facility application is consistent with the Commission's holding in its *2014 Wireless Infrastructure Order*, including the Commission's repeated acknowledgement in that proceeding that small wireless facility equipment can be installed "with little or no impact."

Additionally, the Commission should revise its finding in the *Shot Clock Order* that a violation of the shot clock does not automatically entitle the applicant to an injunction. Rather, the Commission should now declare that delay beyond the relevant time period should lead to the application being deemed granted. At a minimum, the Commission should, consistent with

the majority of courts, hold that the only remedy for a violation of Section 332(c)(7)(B) that comports with the language and policy of the statute is an immediate order requiring the local government to grant the application at issue. Without this clarification that violation of the shot clock must result in the application being deemed granted, there may be no meaningful relief for local government failure to comply with the *Shot Clock Order*.

Finally, the Commission should declare that municipal fees imposed on small wireless facilities must be no more than the fees, if any, imposed on other telecommunications equipment for occupation of the public rights-of-way, depending on the amount of right-of-way actually occupied. Further, the Commission should declare that municipal fees are limited to recovery of the municipality's actual cost of managing the occupation of the right-of-way by the small wireless facility network. Experiential data from WIA members reflects that the imposition of arbitrary and exorbitant fees for access to the public rights-of-way is both widespread and unpredictable. Any other interpretation threatens the deployment of advanced telecommunications technologies and services, and contrary to the language and intent of Section 253.

WIA thus urges the Commission to remain on its pro-competitive path and continue to pursue regulatory reform consistent with these comments.

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I. INTRODUCTION

The Wireless Infrastructure Association ("WIA"), hereby submits its comments regarding the above-captioned proceeding. WIA is the principal organization representing companies that build, design, own, and manage telecommunications facilities throughout the world. WIA's over 230 members include carriers that install and operate small wireless facilities[2] for the provision of telecommunications services. To encourage the deployment of wireless broadband facilities, WIA works at all levels of government to ensure its members have access to fair rates, terms, and conditions, advocating for rules and regulations that promote the deployment of broadband services in federal and state regulatory proceedings around the country.

[2] To assist in a clear understanding of what WIA is discussing, it is important to make clear what WIA means when it addresses a "small wireless facility" in these comments. Unless otherwise stated, WIA will use the term "small wireless facility" to include both individual nodes in a DAS network and also stand-alone small wireless facility installations that are not part of a DAS network. In terms of the size of the equipment, as used in these Comments, WIA will use the volumetric definition contained in the Commission's First Amendment to the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Public Notice, Wireless Telecommunications Bureau Announces Execution of First Amendment to Nationwide Programmatic Agreement for Collocation of Wireless Antennas, 31 FCC Rcd 8824, 8829 (2016)**,** as well as legislation recently passed in Ohio (SB 331) and by the Virginia Legislature on February 20, 2017 (SB 1282), which defines a small wireless facility as a facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services. In addition, the term small wireless facility will mean an installation on a pole or other support structure in the right-of-way that is no greater than 50 feet above ground level or ten feet in height above the tallest existing utility pole within 500 feet of the installation, whichever is greater. These height limitations are drawn from those adopted in Ohio SB 331.

WIA recognizes and appreciates the significant commitment the Commission has made to create a regulatory environment that promotes wireless infrastructure deployment and collocation of communications facilities. Today, that commitment is more necessary than ever, as market developments converge to require intensified infrastructure deployment. These include competition among wireless service providers and between wireless and traditional landline providers, which is powering a shift from landline communications to mobile platforms; consumer demand for wireless data and video offerings, which is imposing unprecedented capacity needs on wireless networks; and the emergence of the Internet of Things, which is fueling the evolution to next generation 5G technologies. Indeed, in this respect, and in the context of this proceeding, the shift to wireless technologies means that the companies deploying small wireless facilities in the public rights-of-way are the "new entrants" that the 1996 Act intended to promote, even if some of them may be large or well-known companies. WIA members large and small are the market participants who are deploying the advanced telecommunications services in competition with the incumbent wireline telecommunications industry as Congress intended and sought with the 1996 Act.

As Chairman Pai stated in his February 28, 2017 speech at the Mobile World Congress:

> And our 5G future will require a lot of infrastructure, given the "densification" of 5G networks. In my country alone, operators will have to deploy millions of small cells, and many more miles of fiber and other connections to carry all this traffic. Doing all this will command massive capital expenditures.
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> From my perspective, then, the key to realizing our 5G future is to set rules that will maximize investment in broadband. For if we don't, the price could be steep. After all, networks don't have to be built. Risks don't have to be taken. Capital doesn't have to be spent in the communications sector. And the more difficult government makes the business case for deployment, the less likely it is that

> broadband providers big and small will invest the billions of dollars needed to connect consumers with digital opportunity.[3]

Other members have echoed the sentiment.[4] Indeed, the Commission has taken significant steps to facilitate the development and deployment of 5G technologies and services.[5]

While the Commission has made important strides towards lowering barriers to wireless infrastructure deployment, WIA's membership still faces obstacles at the federal, state, and local levels that require further examination by policymakers. For instance, the FCC should clarify and modernize systems like its Tower Construction Notification System ("TCNS") and the policies formulated around its use to aid in the tribal consultation process to accommodate the rapid buildout and maintenance of wireless infrastructure. As to macrocell deployments, policymakers must continue regulatory efforts to encourage collocation of facilities. Macrocells—antennas affixed to purpose-built communications supports structures (*e.g.*, towers) as well as antenna collocations on buildings, rooftops, water towers, and other existing tall infrastructure—remain the foundation of the nation's wireless networks.

WIA also supports the respectful and safe deployment of small wireless facilities in public rights-of-way. In the modern telecommunications market, change is rapid and competition

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[3] Remarks of Federal Communications Commission Chairman Ajit Pai at the Mobile World Congress, Barcelona, Spain (Feb. 28, 2017).

[4] Oversight of the FCC, Hearing Before the S. Comm. on Commerce, Science & Transp., 115th Cong. (Mar. 8, 2017) (statement of Michael O'Rielly, Commissioner, FCC) ("[S]tanding in the way of greater Internet access nationwide are barriers imposed by state, local, and tribal entities. . . . This problem will become even more acute as providers seek to deploy the next generation, or 5G wireless services, that will bring greater capacity, higher speeds and lower latency, but will also require many more wireless tower and antenna siting approvals.").

[5] *See, e.g.*, *Use of Spectrum Bands Above 24 GHz for Mobile Services*, 31 FCC Rcd 8014, 8020 ¶ 7 (2016) ("*Spectrum Frontiers Order*").

is fierce. As the Commission recognizes in the *Public Notice*,[6] small wireless facility networks are of critical importance in today's market because they allow providers to provide service to areas that were previously difficult to serve. Indeed, small wireless facilities are critical to the competitive capability of wireless providers now, as well as for the future of telecommunications services, including broadband. For example, in addition to supplying coverage to areas, today, small wireless facilities also help remedy wireless providers' capacity exhaustion. Small wireless facilities also are a key component to the densification of wireless networks. As the Commission recognizes, small wireless facilities must be promptly and widely deployed if the wireless industry is to satisfy consumer demand for broadband services in every location, for the development of the Internet of Things, and ultimately, for deployment of 5G services.[7]

In this way, small wireless facilities meet consumer demand, ease burdens on existing networks, and provide additional competition both to incumbent wireline telecommunications services and among wireless service providers. Thus, policymakers should continue to provide the wireless industry with the flexibility to both replace infrastructure in rights-of-way and build new facilities when necessary. With its comments in this proceeding, WIA urges the Commission to remain on its pro-competitive path and continue to pursue regulatory reform consistent with these comments.

[6] Public Notice, Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies and Mobilitie, LLC Petition for Declaratory Ruling ("*Public Notice*"), 31 FCC Rcd 13360, 13373 (2016).

[7] *Spectrum Frontiers Order*, 31 FCC Rcd 8020 ¶ 7.

II. THE CONCERNS IDENTIFIED BY THE COMMISSION IN 2009 AND 2014 PERSIST—PAROCHIAL LOCAL REGULATIONS AND ACTIONS ARE EFFECTIVELY THWARTING DEPLOYMENT

In the *Public Notice*, the Commission asked whether the concerns that motivated its 2009 *Shot Clock Order*[8] and *2014 Wireless Infrastructure Order*[9] still exist and whether they have become more or less salient.[10] As discussed below, the concerns of delay and regulatory overreaching that were identified in the Commission's 2009 and 2014 orders continue to persist. Indeed, WIA members report that they are facing even more local delay and burdensome regulation than ever before.

A. WIA's Members Experience Significant Delay in Deploying Small Wireless Facilities in the Public Rights-of-Way

As experienced by WIA's members, significant municipal delay is a primary barrier to deployment that effectively prohibits the provision of telecommunications service via small wireless facilities.

For example, one member reports that 70% of its applications to deploy small wireless facilities in the public right-of-way during a two-year period took more than the 90-day shot clock time period for installation of small wireless facilities on an existing utility pole, and 47% took more than the 150 days that would apply even for a new tower.[11] Another member reports

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[8] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 FCC Rcd 13994 (2009) ("*Shot Clock Order*"), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

[9] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865 (2014) ("*2014 Wireless Infrastructure Order*"), *aff'd, Montgomery Cty., Md. v. F.C.C.*, 811 F.3d 121 (4th Cir. 2015).

[10] *Public Notice*, 31 FCC Rcd at 13367-68.

[11] *See, e.g, 2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12973-74 ¶¶ 270-272.

that more than 33% of jurisdictions that it surveyed exceed 90 days and 25% exceed 150 days. In fact, if this member were to bring an action against each jurisdiction that violated the *Shot Clock Order*, it would have to file federal lawsuits against 46 local governments.

These member experiences are not unique. WIA members have uniformly reported on the epidemic of significant delays experienced in jurisdictions throughout the country when seeking to deploy small wireless facilities in the public right-of-way. And the foregoing data reflects the amount of time to gain *approval* of applications. Those numbers do not include all of the applications that have been pending with local governments for months and even years, with no time certain for gaining approval. One member reports an application that has been pending with a New Jersey township for nearly a year, and applications pending in municipalities in New Hampshire and Maine pending for more than two years. Another member has applications in five different jurisdictions that have been pending for nearly *three years*. It is common for members to have multiple jurisdictions where delays have reached two years or more.

Though the driving forces of the delays vary (many of which are described below), the result is the same: the deployment of small wireless facilities and provision of telecommunication services is effectively thwarted. And there is also an immeasurable element. Providers learn about difficult localities and may not even attempt to deploy there. Those effective prohibitions are never recorded.

B. The Patchwork of Local Processes Effectively Prohibits Deployment

One key cause of barriers to entry is the patchwork of inconsistent and often unclear local requirements. Each local government has a set of rules and processes (or lack thereof) associated with deployments in the public right-of-way and potentially even more varied reactions to small wireless facilities; these disparate processes can be costly, time-consuming, and present obstacles that impede deployment. The lack of consistency and clarity, alone, creates a significant barrier

to entry. Wireless networks require significant investments. Asking companies to make those kinds of investments when they cannot determine in advance how long it will take to deploy, what the fees will be, or if the same equipment will be permitted in one community compared to its neighbors creates a significant barrier to the provision of telecommunications services. Yet, that is the current environment faced by WIA's members. WIA members are left to navigate unpredictable and often costly and time-consuming local processes on a project-by-project basis. The parochial, "patchwork quilt" of local regulations is a barrier to entry that conflicts with the purpose and language of the 1996 Act.[12]

1. Local Governments Frequently Impose Traditional Macro Tower Zoning on Small Wireless Facilities in the Rights-of-Way

A significant problem about which the Commission sought information is the prevalence of local governments that impose traditional zoning requirements on installation of small wireless facilities in the public rights-of-way. WIA members have reported an abundance of jurisdictions that seek to impose zoning processes and requirements on applications to deploy small wireless facilities in the public right-of-way.

Most WIA members report that as many as 50% or more of communities are imposing zoning of some kind on small wireless facilities in the rights-of-way. Examples of the imposition of zoning are plentiful. In New Jersey, most jurisdictions do not differentiate between small wireless facilities and traditional macro sites. In fact, the New Jersey League of Municipalities has advised local authorities that zoning approval may be required for antenna attachments to utility poles in the public right-of-way.[13]

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[12] *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21440-42 ¶¶ 102-106 (1997).

[13] *See* http://www.njslom.org/bureau/white-papers/BMI.WP_2016_1.pdf (advising that municipalities can require wireless providers and facility developers operating as public utilities

Application of traditional municipal zoning to small wireless facilities in the public rights-of-way imposes a discriminatory barrier to the provision of telecommunications services. First, local zoning processes are complex and time consuming. It is extremely common for cities to demand a "pre-application" meeting with planning department staff before the provider can even submit its application. Once submitted, applications are subject to multiple layers of discretionary review and public comment. Each layer of the process takes weeks or months, and at any juncture, a motivated member of the public or staff member can effectively stop the deployment. The applications themselves must contain detailed, complex plans and materials, such as engineering studies, photo simulations of the proposed installation, information and photos of the surrounding area, information regarding all surrounding wireless facilities for distances up to a mile or more, and frequently detailed radio frequency studies regarding the need for the installation. Municipal staff and consultants will review every detail, and applications are frequently rejected or returned for allegedly missing information or based on demands for yet more information. Evaluation of the applications will likely involve at least one, and frequently multiple, public hearings where the applicant is required to present witnesses and evidence to prove that it has satisfied the local code's various standards. At those hearings, local residents can, and frequently do, object and oppose the application (all too frequently based on purely "not in my back yard" "NIMBY" grounds). The local codes almost always vest the local government with near unfettered discretion to deny the application for any number of reasons,

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to go through zoning for access the public right-of-way). The same advisory paper cautions municipalities to "make sure that wireless facilities, including small wireless facilities, do not fall within their code's definition of 'public utility'" akin to "incumbent natural gas, electricity, basic telephone providers," which are subject to an expedited land use approval process.

including issues as broad and ambiguous as the "public interest" or "compatibility" with the character of the area.

A significant problem with these zoning requirements is that they are wholly discretionary and leave every location to the whim of local politics. For example, in a Southern California city, one member sought to install a new node on an existing utility pole. Despite the fact that the member had obtained city approval to deploy over two dozen identical installations across the city, including in residential areas, in one case the city denied the application solely because of opposition from an organized group of residents. Such examples are extremely common.

Zoning processes and requirements are not only costly and time-consuming, but they also often impose requirements that are inapplicable, or produce absurd results, in the context of small wireless facility deployment in the public right-of-way. The requirements were almost always written to apply to traditional tall, macro towers on private property, and thus contain provisions that cannot be meaningfully applied to a facility on a standard utility pole in a right-of-way. Nonetheless, companies are required to prove compliance with them, or prove that they satisfy the significant burden for a variance. Notably, zoning codes frequently limit or prohibit outright any wireless facilities in certain districts, such as residential districts. Again, those types of regulations reflect assumptions regarding the potential coverage of wireless facilities that may be true for 100 plus foot tall towers, but are inapplicable in the context of small wireless facility installations that may only provide wireless coverage over a few hundred feet in any direction. The effect is to prohibit deployment in entire areas of the community.

Examples of absurd results are common. For example, to deploy small wireless facility equipment on a utility pole in the right-of-way in one Pennsylvania municipality, a WIA member

must seek a variance from the requirement to put an eight-foot fence around the facility—a requirement that was clearly meant to apply only to traditional towers. Obviously, no other right-of-way occupant is required to install an eight-foot fence around the utility pole or seek a variance from that requirement. Yet, the municipality will deny the small wireless facility installation unless the company can justify a variance from the patently inapplicable requirement—all because an antenna will be installed.

A Maryland city in the Baltimore–Washington metropolitan area interprets its zoning law such that a utility pole is a structure with a roof, and therefore, it mandates that antennas can only be mounted on structures higher than 30' and that the top of the antenna must not exceed the top of the structure. Should an antenna be mounted on the "roof" of the structure, then the antenna must be set back from the edge equidistant to the max height of the antenna. Given the typical diameter of a utility pole, the requirement can never be met. Nonetheless, the city insists that the provision applies to small wireless facilities. Applied to small wireless facilities on utility poles, this traditional zoning provision creates a nonsensical barrier to deployment.

Most objectionable, the imposition of zoning requirements on small wireless facilities is discriminatory. It is essentially unheard of for other entities with facilities in the same rights-of-way to be subject to such zoning requirements. Wireline telecommunications providers, cable operators, and electric companies installing on utility poles are generally either exempted from zoning altogether, or else, they are deemed to be "permitted uses" in every zone.[14] Despite the fact that small wireless facilities are similar in size and appearance to the equipment installed by

[14] For example, the New Jersey Municipal Association cited above warns cities not to allow small wireless facilities in the right-of-way to fall into such exemptions.

those other companies, and sometimes smaller than those other facilities, localities impose zoning solely based on the existence of radio frequency emitting antennas on the pole.

The most problematic element of this discriminatory treatment is the fact that the other providers are not subject to the constant threat of a wholly discretionary process preventing deployment. In addition, they are not subject to the burdensome limitations that cities have imposed on small wireless facilities in the right-of-way, such as:

- Minimum distances from residential buildings (small wireless facilities may be prohibited even though the utility pole with other attachments is already that close to a residence)
- Minimum distances (*e.g.*, 300 or 500 feet) between small wireless facility antennas, regardless of the carrier
- Screening and camouflage requirements
- Advanced public notice to surrounding property owners
- Public hearings

Many municipalities across the country also require demonstration of "need" as part of the zoning approval process applied to small wireless facility applications, necessitating the submission of coverage maps and radio frequency expert testimony to satisfy local requirements. Essentially, cities are trying to force WIA's members to justify networks on a site-by-site basis using concepts developed in the context of 100-plus foot tall towers. Companies can have no certainty that their network design and technology in any given location will be approved, much less on a broader regional basis. Providers of service viawireline generally face no such requirements and no such discretionary threats to their ability to compete.

The imposition of zoning requirements on small wireless facility applications has proven to be costly and time-consuming for WIA members. In one California county in the San Francisco Bay Area, review of small wireless facility applications by the Architectural Review Board alone takes 150 days for each application. In one large city in the Seattle metropolitan area that requires the full zoning process for small wireless facility deployment in the right-of-way, one WIA member has had its applications pending for nearly a year.[15] One WIA member has had a small wireless facility application pending in a New Jersey township since November 2015, awaiting completion of a convoluted process that required initial municipal consent followed by a zoning process that involves a separate application, hearing, and adoption of a resolution by the township's planning board. In one New Jersey township, a WIA member had received consent to access the right-of-way, only to have that consent revoked after the township decided it would require discretionary planning board review of its small wireless facility attachments in the public right-of-way. The member experienced a similar situation in Massachusetts, where the town granted multiple right-of-way permits, but then decided zoning permits would also be required. That zoning process took seven months to gain the necessary approvals. One city in northern Maryland adopted a zoning amendment to allow antenna collocation on city-owned structures in the right-of-way, but any such installations are limited to neutral host facilities and must host multiple carriers out of the same antenna. But even with the zoning amendment purportedly allowing them, after a multiple year process, one WIA member is still seeking the right to place small wireless facilities on public utility poles in that City's right-of-way.

[15] In the same city, that WIA member has been seeking a lease agreement for city-owned poles for two years.

The use of municipal consultants also complicates and increases the cost of these zoning requirements. For example, one New Jersey township imposes a zoning application process that includes professional escrow fees on top of application fees amounting to several thousand dollars. A Minnesota city requires special use permits for small wireless facility attachments to existing utility poles, and the City uses a consultant to review its zoning applications. The City demands that companies pay an $8,500 application fee for each pole to cover the consultant's fee, plus additional fees for after-installation inspection.

Other jurisdictions have categorically denied (or indicated that they will categorically deny) applications for wireless attachments to utility poles in the public right-of-way. For example, a town in Massachusetts has a categorical prohibition on wireless attachments to utility poles.[16] One jurisdiction in an outer suburb of the Chicago metropolitan area has denied all applications for small wireless facility attachments in the right-of-way. At least one city in Texas refuses all requests to put wireless facilities in the right-of-way and has indicated that it does not want any wireless facilities in the rights-of-way.

2. Local Governments Refuse to Apply Their Standard Right-of-Way Permitting Process for Small Wireless Facilities

A related problem to zoning is that some local governments refuse to apply their standard right-of-way permitting process to small wireless facilities in the public rights-of-way. Cities around the country have generally adopted regulations pursuant to which telecommunications and utility facilities are installed on poles. Those processes typically involve a ministerial permitting process pursuant to which the locality's "Department Of Public Works" or

[16] One WIA member was able to secure a variance for a single small wireless facility on a utility pole through a protracted and contentious zoning process that lasted six months.

"Department of Streets" (or some similar department) reviews the applications and issue permits, typically in a matter of days or at most a few weeks. In some communities, those companies are not required to obtain ***any*** site-specific permit before installing equipment on existing utility poles. Yet, for small wireless facility installations on such poles, many cities are refusing to process the deployments under the standard right-of-way permit process. Or the cities impose additional requirements or restrictions on small wireless facilities that are not imposed on other right-of-way users.

In extreme examples, cities are requiring small wireless facility installations to comply with requirements that are not even consistent with the city's code. For example, one jurisdiction in a western suburb of Chicago requires that a full special use permit package be submitted with each application, even if the location of the proposed deployment is not in a zone or district that requires a special use permit under the local code.

3. Lack of Clarity in Local Processes Is a Significant Problem

Even where a local zoning code is silent on wireless installations in the public right-of-way, this does not translate into a green light for installation. A local government may change course and ultimately require zoning approval or may leave applications in limbo due to the absence of any clear process. For example, one Chicago suburb attempted to revoke a WIA member's already-granted right-of-way permit because it did not have a policy or procedure in place for small wireless facilities in particular. Likewise, Crown Castle needed court vindication when Newport News, Virginia, sought to stop Crown Castle's deployment despite granting it

right-of-way permits and a franchise.[17] Several members have experienced multi-year ordeals where local governments have repeatedly changed the rules mid-stream.

In addition, despite having well-established processes for deployment of telecommunications equipment in the public rights-of-way, many local governments are delaying deployment while they consider or impose regulations that single out small wireless facilities. Various jurisdictions are in the process of drafting ordinances to address small wireless facility deployment in the public rights-of-way. In many cases, WIA and its members are working cooperatively with those jurisdictions to achieve reasonable regulations that do not thwart the deployment of telecommunication services. Unfortunately, despite the industry's best efforts to educate local governments on the benefits of small wireless facilities and the federal mandate of nondiscriminatory regulation, many of the proposed ordinances will impose discretionary, burdensome requirements that do not apply to non-wireless right-of-way occupants and act as a barrier to deployment.

4. Local Governments Continue to Impose Moratoria

Many jurisdictions across the country have imposed moratoria (or *de facto* moratoria) on the filing, acceptance and/or processing of permits for wireless facilities in the public right-of-way, completely halting deployment of small wireless facilities and the provision of telecommunications services.[18]

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[17] *Crown Castle NG Atl. LCC v. City of Newport News*, No. 4:15CV93, 2016 WL 4205355 (E.D. Va. Aug. 8, 2016), *appeal filed*, No. 16-2025 (4th Cir. Sept. 7, 2016).

[18] *See, e.g.*, Mark Benjamin, Fresno Bee, "Fresno County to cellphone tower companies: Stay off our land, at least for now" (Nov. 20, 2016), http://www.fresnobee.com/news/local/article116012318.html; Noel Brinkerhoff, American Canyon Eagle, "American Canyon halts effort to add wireless antennas to streetlights" (Aug. 31, 2016), http://napavalleyregister.com/eagle/news/local/

For example, multiple jurisdictions in Florida have adopted a moratorium on the permitting or construction of wireless communications facilities in the public right-of-way while they consider ordinances to govern such facilities.[19] *De facto* moratoria have also been imposed across multiple jurisdictions in Massachusetts and Illinois. These jurisdictions have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered.[20] These *de facto* moratoria have resulted in delays ranging from 2.5 to 10 months or, in some cases, indefinite delays. In addition to the general adverse impact on the industry, frequently such moratoria are targeted responses, put in place after initial applications were already submitted or approved. In other words, twenty years after passage of the 1996 Act, local governments are still responding to applications for right-of-way installation with moratoria that stop competition and thwart deployment of new technologies.

One WIA member is currently prohibited from deploying approximately 85 small wireless facilities in nine jurisdictions that have either enacted a moratorium or entered an

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american-canyon-halts-effort-to-add-wireless-antennas-to-streetlights/article_1258e1e4-a625-5b48-b6b8-a848b57e5b11.html.

[19] *See, e.g.*, Alexandra Seltzer, Palm Beach Post, "City issues moratorium on new cell towers" (Nov. 21, 2016), available at http://www.mypalmbeachpost.com/news/local/city-issues-moratorium-new-cell-towers/bQCOw0PXcaPQrUo2SlxvUN/; Indeed, the publicly available "Report of the Florida Association of County Attorneys (FACA) Cell Tower Right-of-Way Task Force" acknowledges that "Many local governments throughout the state have adopted moratoriums." *See* http://faca.fl-counties.com/sites/default/files/2017-01/1.6.17_FINAL%20Report%20of%20the%20FACA%20Cell%20Tower%20ROW%20Task%20Force%201.6.17%20revised_0.pdf, last visited Feb. 27, 2017.

[20] The WIA member seeking to deploy in these jurisdictions has been working cooperatively with the local government officials (and, in some cases, the consultants they have hired) as they formulate their small wireless facility permitting policies.

indefinite holding pattern constituting a *de facto* moratorium. These types of obstacles have also added between one to three years of delay to the member's deployment efforts, and in certain cases, have fostered delays without a foreseeable end.

Even in jurisdictions where state legislation has been enacted to streamline the process and limit local government authority over small wireless facilities, some local governments have responded by enacting moratoria while they "study the effect" of such legislation on their authority.[21]

Multiple cities in Texas have implemented de facto moratoria pending the outcome of a proceeding before the Texas Public Utility Commission involving the right of small wireless facility entities to deploy their facilities in the public right-of-way. In a related vein, one member reported instances where it has foregone opportunities to file lawsuits for clear violations of Section 253 because, among other reasons, it feared municipal backlash for other pending requests (or against other applicants). For example, even after one WIA member achieved a favorable outcome in litigation with the City of Newport News, Virginia,[22] that locality has yet to move forward on requests by other entities to access the public right-of-way to install small wireless facilities.

[21] *See, e.g.*, Jaime Anton, Royalton Post, "City extends antenna moratorium" (Feb. 11, 2017), http://www.thepostnewspapers.com/north_royalton/local_news/city-extends-antenna-moratorium/article_838b18bd-1cbb-5ddc-9620-9a37cc81ebc3.html.

[22] *City of Newport News*, 2016 WL 4205355. In that case, the City attempted to stop Crown Castle from finishing construction of four DAS nodes even after the City had granted Crown Castle a franchise and issued it specific right-of-way permits. The City argued that the nodes were subject to the City's zoning code, and were not permitted under that Code. The District Court held that the City's actions violated both Virginia law, because the City did not require zoning of any other right-of-way occupants, and was a breach of the franchise agreement.

5. Local Governments Seek to Profit from Small Wireless Facilities by Imposing Unreasonable and Discriminatory Fees

The imposition of unreasonable and discriminatory fees for access to the public right-of-way is both widespread and unpredictable. WIA members have reported municipal fee demands ranging anywhere from exorbitant "one time" fees, to monthly or annual recurring fees with steep escalation percentages. The fees charged are unpredictable, not only from jurisdiction to jurisdiction, but also within particular jurisdictions themselves—*i.e.*, one right-of-way user cannot always expect to be charged the same fee as other right-of-way users. Indeed, in some cases, one company deploying small wireless facilities on poles may be charged different fees than prior companies deploying small wireless facilities on poles. This unpredictability makes it difficult for companies to make meaningful evaluations and ultimately stymie investment.

a. Imposition Of High Initial Fees And Excessive Recurring Charges

Some local governments impose high initial fees for access to the right-of-way. One city in the suburbs of Seattle requires a $5,000 fee before it will begin review of the right-of-way use agreement that it requires. Similarly, a Virginia city seeks to charge a one-time fee of $5,000 to evaluate right-of-way permits for small wireless facility attachments to existing structures.

Excessive recurring charges on small wireless facility installations are also common. For example, one Massachusetts city seeks to charge $6,000 per pole occupied (the poles are not owned by the City), per year, for the right to use the public right-of-way. For one member that seeks to deploy 50 small wireless facilities in the right-of-way in that jurisdiction, that amounts to a $300,000 annual fee for installations that simply occupy the right-of-way on existing utility-owned poles. A northeast state Department of Transportation imposes a $37,000 per year fee *per node*, which fee is applied in a discriminatory fashion because "public utilities," which includes wireline telecommunications providers, are exempt from the fee. Another east coast Department

of Transportation seeks to charge small wireless facility attachments to existing utility poles in the right-of-way the same amount that the DOT charges to install a new tower—$24,000 per year. Yet, the DOT charges no such fee to the electric company for installation of its utility poles. In other words, the DOT is claiming that addition of an antenna converts a pole on which no fee is paid into a "tower" that requires a $24,000 per year fee.

In most cases, the high fees charged by cities bear no rational relation to the cities' management of the public right-of-way. For example, in Texas, one WIA member was required to pay the equivalent of $1,000 per antenna annually to maintain its small wireless facilities in the public right-of-way—an arbitrary amount that bears no relation to the city's management of the public right-of-way. Indeed, the member must separately pay the fees related to obtaining a standard right-of-way permit, which presumably reflect the city's regulatory costs.

WIA members have reported other wide ranging municipal fee demands for use of the public right-of-way—anywhere from percentages of gross revenues as high as 5.4%, to linear foot charges of several dollars per foot, to $10,000 in up-front "deposits" for application review. Those fees have no relation to the costs imposed by the facilities deployed.

Incredibly, some cities seek to charge fees based on the false notion of a "fair market value" of the public rights-of-way. For example, cities in Texas have asserted that they can charge fees for occupation of the public rights-of-way by wireless facilities (but not telecommunications facilities unrelated to wireless equipment) based on their assessment of the value of the private property adjoining the right-of-way. So, under their theory, the right-of-way in front of a commercial high rise requires more payment to the city than a pole in the right-of-way in front of a home, or even, a pole in front of a high value home requires a higher fee to the city than one in front of a less valuable house.

These are examples of naked attempts to profit from the deployment of wireless facilities.

b. Excessive Fee Demands for Access to Municipal Poles

Another growing problem is access to municipal infrastructure. In many areas, cities have prohibited the installation of utility poles. In those areas, the only above ground poles are street lights or traffic signal poles owned by the city. Because the city prohibits installation of privately-owned poles, the only way that small wireless facilities can be deployed is through use of the city-owned poles. This situation has led to problems with cities either refusing access altogether or leveraging the situation to seek monopoly rents.

The issue is often compounded by the use of consultants. For example, some cities have entered into consulting agreements granting third party firms or individuals the exclusive right to negotiate leases, licenses, or other agreements for the rental of space on municipal poles for deployment of small wireless facilities. These types of agreements are troublesome on many levels. First, they specifically target entities deploying wireless infrastructure, but not any other user of municipal property.

Second, such agreements are structured so that both the municipality and the consultant can maximize their profit. One consultant has entered into virtually identical "Representation Agreements" with cities in Minnesota, pursuant to which this consultant is compensated on a "success fee structure" – *i.e.*, the higher the rent charged to the wireless infrastructure lessee, the higher the compensation to the consultant.[23] The success fee is based on the percentage increase in rent resulting from an entity's renewed lease agreement with the city as compared to its initial lease agreement. Even more egregious, these "Representation Agreements" promote the imposition of exorbitant rents on new entrants—*i.e.*, where the lease agreement is not a renewal

[23] One WIA member reports that a city demanded $6,000 per year/per pole.

agreement, the baseline rent for comparison and calculation of the success fee is determined by the average rent of all pre-existing lease agreements for the previous calendar year. Accordingly, the consultant is motivated to negotiate lease agreements with new entrants that extract the highest percentage increase in rent possible as compared to lease agreements with existing (competitor) lessees.

As a result, one city in Minnesota demanded that one company seeking to deploy facilities in the right-of-way pay more than fourteen times the amount the city had negotiated with another entity three years prior. These agreements with the consultant are a prime example of cities (and their consultants) that apparently view wireless infrastructure in the public right-of-way as a profit making opportunity, rather than a corridor held in the public trust for common use that the city must manage in a competitively neutral and nondiscriminatory manner to foster enhanced competition, as was the purpose of the 1996 Act.[24]

c. Other Unreasonable Conditions And Actions Imposed By Local Governments

Additionally, WIA members report that some cities have used access to the right-of-way as a bargaining chip for other unreasonable demands, such as free telecommunications service or "charitable donations" (where charging fees for use of the right-of-way are specifically prohibited by law), or to gain leverage in unrelated matters. For example, one Massachusetts jurisdiction has refused to take action on one WIA member's six permit applications pending for nearly a year unless and until an affiliate of the member cooperates with other municipal initiatives.

[24] A similar consultant called "5 Bars" advertises its abilities to "optimize new City revenue sources from wireless infrastructure." *See* http://5bars.com/communities.

A city in Maryland has refused to allow one WIA member access to its pole infrastructure in the right-of-way unless the member agrees to two separate agreements, each with its own fees, conditions, and demands (such as placing additional conduit for the city's exclusive use, special permitting fees, the requirement for public hearings, and monthly recurring charges escalating at 4% per year). Other unreasonable demands and limitations reported by WIA members include examples such as a cash escrow for the life of an installation, and annual landscaping fees.

III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING INTERPRETING SECTION 253

In the *Public Notice*, the Commission summarizes some of the cases addressing Section 253, and asks whether it should, "as the expert agency, attempt to reconcile or otherwise resolve these or other difference of interpretation among the courts."[25] As demonstrated below, the Commission should issue a declaratory ruling holding that the Ninth Circuit's decision in *City of Auburn v. Qwest Corp.*,[26] and other similar cases that adopted and enforced the Commission's *California Payphone* standard under Section 253, were correct. The Commission should also declare that the restrictive interpretations subsequently adopted by the Eighth Circuit in *Level 3 Communications, L.L.C. v. City of St. Louis*[27] and the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*[28] were incorrect.

Specifically, the Commission should declare, as a result, that Section 253(a) is not limited to outright or explicit prohibitions on service, but is violated by any state or local requirements

[25] *Public Notice*, 31 FCC Rcd at 13370.

[26] 260 F.3d 1160, 1175-76 (9th Cir. 2001), *overruled by Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571 (9th Cir. 2008).

[27] 477 F.3d 528, 532 (8th Cir. 2007).

[28] 543 F.3d 571 (9th Cir. 2008).

that: (1) "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment;" or (2) imposes requirements that in combination or as a whole impede the provision of any telecommunications service, including but not limited to requirements that leave local governments unfettered discretion over applications, and requirements imposing lengthy or onerous application processes.[29] In so doing, the Commission should clarify that to violate Section 253(a) a local government requirement need not be "insurmountable" or make it completely impossible to provide telecommunications services.[30]

Moreover, the Commission should explicitly declare that imposition of regulations and requirements on small wireless facilities that are not imposed on other telecommunications equipment installed on standard poles in the public rights-of-way is a barrier to entry, and is not reasonable or competitively neutral and nondiscriminatory management of the public rights-of-way. The Commission should further declare that local government requirements that exercise unfettered discretion over whether a small wireless facility network is deployed also have the effect of prohibiting telecommunications service and are not within local governments' Section 253(c) authority to manage the public rights-of-way. The Commission should make clear that unreasonable delay is a prohibition of telecommunications service in violation of Section 253, in addition to violating Section 332(c)(7)(B)(ii). In so doing, the Commission should clarify that the maximum reasonable time for a local government to act on an application to install small

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[29] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (1996 Act "fundamentally restructures local telephone markets. States may no longer enforce laws that ***impede*** competition . . .." (emphasis added)); *City of Auburn,* 260 F.3d at 1175-76.

[30] *See, e.g., RT Commc'ns, Inc. v. FCC,* 201 F.3d 1264, 1268 (10th Cir. 2000); *TCG N.Y., Inc. v. City of White Plains,* 305 F.3d 67*,* 76 (2d Cir. 2002).

wireless facilities is 60 days, and that if the local government fails to act within that time, the application is deemed granted.[31] Finally, the Commission should declare that municipal fees imposed on small wireless facilities must be no more than the fees, if any, imposed on other telecommunications equipment for occupation of the public rights-of-way, and that municipal fees are limited to recovery of the municipality's actual cost of managing the occupation of the right-of-way by the small wireless facility network.

Such a declaration by the Commission will not be breaking new ground. Rather, it will be consistent with, and indeed reinforce, the Commission's prior interpretations of Section 253 as well as the many court decisions that followed the Commission's lead. The Commission has consistently recognized the need to act to promote the deployment of advanced, competitive telecommunications networks and services. Such a declaration now would be another logical step by the Commission to further the purposes and policies of the 1996 Act.

Moreover, the Commission has authority to issue a declaratory ruling interpreting Sections 253 and 332, and issuing such a declaratory ruling is the appropriate vehicle for the Commission to clarify the law in this area.[32] As noted in the *Public Notice*, the Commission has previously used a declaratory ruling to resolve conflicts in the interpretation of the Communications Act.[33] Indeed, the situation in the current proceeding is very similar to the Commission's declaratory ruling in the cable television *Local Franchising Order*, where the Commission similarly addressed when denial of a cable franchise constituted "an unreasonable

[31] At a minimum, the Commission should declare the violation of the *Shot Clock Order* requires the expedited grant of an injunction requiring the application be granted.

[32] *See, e.g., Shot Clock Order*, 24 FCC Rcd at 14016-18 ¶¶ 56-63 (2009) (rejecting Third and Fourth Circuits' "one provider" interpretation of 47 U.S.C. § 332(c)(7)(B)(i)(II)).

[33] *Public Notice*, 31 FCC Rcd at 13365-66 (citing *Shot Clock Order*, 24 FCC Rcd at 14020 ¶ 67).

barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment."[34]

A declaratory ruling in this proceeding clarifying the scope of local authority under Sections 253 and 332 will fulfill the Commission's mandate to eliminate unnecessary regulation and promote the deployment of advanced telecommunications services by eliminating local regulations that prohibit competition and deployment.

A. The Commission Should Reconcile Inconsistent Enforcement of Section 253(a)

The primary purpose of the 1996 Act was to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . .."[35] The Conference Committee Report explained that the purpose of the statute is to provide for a "pro-competitive, de-regulatory national policy framework."[36] When Congress passed the 1996 Act, it expressed its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[37]

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[34] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1*992, 22 FCC Rcd 5101, 5102 ¶ 1 (2007) ("*Local Franchising Order*") (interpreting Section 621(a)(1) of the Act, which prohibits local franchising authorities from "unreasonably refus[ing] to award" competitive cable franchises, and holding that if a local franchising authority fails to act on an application for a local franchise within 90 days for an applicant that already has access to rights-of-way or 6 months for all other applicants, then an interim franchise will be deemed granted until the franchising authority takes action on the application), *aff'd*, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (2009).

[35] H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.) ("Conference Committee Report").

[36] *Id.*

[37] Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

Indeed, Congress made clear in 47 U.S.C. § 157(a) that

> [i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.[38]

In addition, in Section 706 of the 1996 Act (codified at 47 U.S.C. § 157), Congress directed the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[39] Section 706(b) directs the Commission to undertake regular inquiries into the availability of advanced telecommunications capabilities, and if the Commission finds that advanced telecommunications capabilities are not being deployed to all Americans, Section 706(b) requires the Commission to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[40]

To effectuate its policy goals, Congress enacted Section 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit *or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service."[41] In so doing, Congress gave due consideration to the potential

[38] 47 U.S.C. § 157(a).

[39] Pub. L. No. 104-104, § 706(a), 110 Stat. 153 (1996) (reproduced in the notes under 47 U.S.C. § 157).

[40] Pub. L. No. 104-104, § 706(b), 110 Stat. 153 (1996) (reproduced in the notes under 47 U.S.C. § 157).

[41] 47 U.S.C. § 253(a) (emphasis added).

conflict between state and local government regulation and the national need for deployment of advanced telecommunications and information technologies. In Section 253(a), Congress stated a broad general rule preempting local and state regulation. State and local governments generally were preempted from hindering market entry. To retain some state and local regulatory involvement, Congress reserved in Section 253(b) and Section 253(c) specific areas for local oversight. In Section 253(b), Congress reserved only to states the authority to adopt "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[42] In Section 253(c), Congress reserved to states and local authorities the power to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis. . .."[43]

This statutory structure has been recognized to provide a broad preemption of local requirements and a narrow reservation of authority to municipalities.[44] Indeed, such a reading of Section 253 is necessary and appropriate to give effect to the goals and policies of Congress in the 1996 Act.

The purpose of Section 253(a) was to remove the ability of State or local governments to choose or influence who could provide telecommunications services.[45] As the Commission explained in the *Texas PUC Order*, "[t]hrough this provision, Congress sought to ensure that its

[42] 47 U.S.C. § 253(b).

[43] 47 U.S.C. § 253(c).

[44] *See, e.g., TCI Cablevision*, 12 FCC Rcd at 21441-43 ¶¶ 103-109.

[45] *See, e.g., Pub. Util. Comm'n of Tex.*, 13 FCC Rcd 3460, 3463 ¶ 4 (1997) ("*Texas PUC Order*").

national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states."[46] In its seminal decision in *TCI Cablevision of Oakland County, Inc.*, the Commission emphasized that "Congress intended primarily for competitive markets to determine which entrants shall provide telecommunications services demanded by consumers."[47]

Nonetheless, although Section 253 was enacted as a cornerstone of Congress' intention to limit the authority of states and local governments over telecommunications, and despite clear guidance from the Commission in early cases, judicial interpretation and application of Section 253 has not been uniform, particularly in recent cases. As a result, as described above, telecommunications providers seeking to deploy small wireless facilities have encountered increasing barriers from local governments in the form of excessive demands and requirements. To prevent a parochial patchwork of requirements from thwarting the deployment of these critical, advanced technologies and services, the Commission should take this opportunity to clarify Section 253 and, in so doing, effectuate Congress' deregulatory vision.

1. The Commission's and Courts' Initial Interpretation of Section 253 Correctly Reflected the Deregulatory Intent of the 1996 Act

Cases decided by the Commission and the courts shortly after passage of the 1996 Act correctly reflected the intention of Congress to let competition, not parochial local interests and

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[46] *Id.*

[47] *TCI Cablevision*, 12 FCC Rcd at 21440-41 ¶¶ 102, 105; *see also N.J. Payphone Ass'n, Inc. v. Town of W. N.Y.*, 299 F.3d 235, 245 (3d Cir. 2002) (noting Congress' "intent to enhance competition and eliminate local monopolies"); *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999) (noting Section 253 "prevent[s] state and local governments from standing in the way of Congress's new free market vision").

regulations, determine which providers and technologies would successfully compete in the marketplace. The standard adopted in those cases recognized that Section 253(a) does not require the company to show a complete, "insurmountable" prohibition. Rather, the Commission and courts gave effect to the language of Section 253(a) that preempts not only local requirements that "prohibit" but also requirements that "have the effect" of prohibiting. For example, in *Classic Telephone, Inc.*, the Commission emphasized that with Section 253, Congress intended to eliminate impediments to deployment by *all* entities.[48] The market, not local regulations, was to determine success in the marketplace:

> As explained in the *Local Competition First Report and Order*, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing *all* providers to enter *all* markets." Section 253's focus on State and local requirements that may prohibit or have the effect of prohibiting any entity from providing any telecommunications services complements the obligations and responsibilities imposed on telecommunications carriers by the 1996 Act that are intended to "remove not only statutory and regulatory impediments to competition, but *economic and operational* ***impediments*** as well." *Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers*, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.[49]

In *TCI Cablevision*, the Commission reiterated that Section 253 was intended to limit the authority of local governments, in particular, noting that a "third tier" of regulation that impedes deployment was contrary to Section 253.[50]

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[48] *Classic Tel., Inc.*, 11 FCC Rcd 13082 (1996).

[49] *Id.* at 13095-96 ¶ 25 (emphasis added).

[50] 12 FCC Rcd at 21441 ¶ 105.

In *California Payphone*, the Commission articulated a standard for evaluation of whether a requirement "has the effect" of prohibiting service under Section 253(a). The Commission stated that it considers "whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[51] Notably, the Commission's *California Payphone* articulation required only that the requirement "inhibit" or "limit" the telecommunications provider—not that it completely bar service in all scenarios. Likewise, the Commission's standard effectuated the intention of Congress by focusing on whether the local requirement limits the ability of any entity to compete in a "fair and balanced" regulatory environment. In other words, new entrants or certain types of providers are not allowed to be targeted with regulations not imposed on others (notably incumbents).

Following the same approach, in 1999, the Commission held that the State of Minnesota's agreement granting a single provider the exclusive right to construct fiber optic facilities in the state freeway rights-of-way was a barrier to entry in violation of Section 253(a).[52] Notably, the Commission rejected the State's argument that because other providers would be permitted to lease capacity on a nondiscriminatory basis, the agreement did not have the effect of prohibiting entry. The Commission emphasized that Section 253(a) bars any state or local action that *impedes* competitors' use of any possible market entry methods (*e.g.*, facilities-based, resale, etc.).[53] Indeed, in the *Minnesota Order*, the Commission stated that "section 253(a) bars state or local requirements that ***restrict*** the means or facilities through which a party is able to provide

[51] *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206 ¶ 31 (1997).

[52] *Petition of State of Minnesota for Declaratory Ruling*, 14 FCC Rcd 21607(1999) ("*Minnesota Order*").

[53] *Id.* at 21717 ¶ 38.

service."[54] Again, the Commission did not require a complete barrier, but rather, focused on any requirements that restrict the means or facilities for providing services.

In the *Minnesota Order*, the Commission also rejected the State's arguments that other providers had alternative rights-of-way and routes available, stating that the existence of alternative rights-of-way does not mean that the challenged regulation "does not have ***the potential to prevent*** certain carriers from providing facilities-based services."[55] The Commission's focus was on the potential impact, not a showing of financial impossibility. Specifically, the Commission focused on the fact that alternative routes appeared to be more expensive and thus would impose a competitive disadvantage on those forced to use those routes.[56] It therefore held that a requirement that imposed greater cost on one set of competitors compared to others violated Section 253.

Initial court treatment similarly recognized that Section 253(a) did not require a complete prohibition of service.[57] Rather, many courts focused on preempting local regulatory schemes that, in combination or on the whole, had the effect of prohibiting entry, including burdensome regulatory schemes that gave local governments unfettered discretion to determine whether a provider could deploy. For example, in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, in the absence of any single provision that explicitly prohibits entry, the court held that "in combination," the totality of the obligations imposed by Prince George's County's

[54] *Id.* at 21708 ¶ 21 (emphasis added) (citing *Texas PUC Order*, 13 FCC Rcd 3460).

[55] *Id.* at 21709 ¶ 23 (emphasis added).

[56] *See, e.g., id.* at 21713-14 ¶¶ 28-29.

[57] *Iowa Utils. Bd.*, 525 U.S. at 370 (under the 1996 Act, states "may no longer enforce laws that *impede* competition . . .") (emphasis added).

telecommunications ordinance violated Section 253(a) by "hav[ing] the effect of prohibiting" the provision of telecommunications services.[58]

In *City of Auburn*, the Ninth Circuit held that Section 253 is a "virtually absolute" preemption on municipal franchise requirements.[59] It stated that Section 253's "purpose is clear—certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena."[60] Applying that standard, the court held that the city's requirements, as a whole, had the effect of prohibiting the provision of telecommunications service. In particular, the court emphasized that the burdensome application process and the unfettered discretion left to the city had the effect of prohibiting telecommunications service in violation of Section 253.[61]

In *RT Communications, Inc. v. FCC*,[62] the Tenth Circuit—in a decision affirming the Commission's decision in *Silver Star Telephone Co.*[63]—explicitly rejected the argument that a regulation must be a complete barrier to entry to violate Section 253(a). The court held that "*the extent to which the statute is a 'complete' bar is irrelevant*. [Section] 253(a) forbids any statute

[58] 49 F. Supp. 2d 805, 815 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000), *on remand*, 155 F. Supp. 2d 465 (D. Md. 2001). The Fourth Circuit Court of Appeals vacated and remanded the district court's ruling on the grounds that the court should have addressed the state law claims in the case first, as their resolution may have mooted the federal law issues. The Fourth Circuit did not address the merits of the district court's decision. While the district court's decision has no precedential value, it will be discussed in these comments as indicative of at least one court's considered interpretation of Section 253.

[59] 260 F.3d at 1175.

[60] *Id.*

[61] *Id.* at 1178-79.

[62] 201 F.3d 1264 (10th Cir. 2000).

[63] 12 FCC Rcd 15639 (1997), *recon. denied*, 13 FCC Rcd 16356 (1998).

which prohibits or has 'the effect of prohibiting' entry. *Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it*."[64]

The Second Circuit in *TCG New York, Inc. v. City of White Plains*, agreed with the Tenth Circuit's holding that to violate Section 253(a) a prohibition does not need to be complete or "insurmountable."[65] It also followed the Commission's standard that an ordinance runs afoul of Section 253(a) if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment."[66] Like the other courts, the Second Circuit emphasized that it must consider the impact of the ordinance as a whole because "applying [Section] 253(a) to individual provisions without considering the Ordinance as a whole would neglect the possibility that a town could effectively prohibit telecommunications services through a combination of individually non-objectionable provisions."[67]

In *Qwest Corp. v. City of Santa Fe*, the Tenth Circuit again reiterated that to establish a Section 253(a) violation, "[a] regulation need not erect an absolute barrier to entry . . . to be found prohibitive."[68] Like other courts, it held that the "cumulative impact" of requirements could be prohibitive.[69] And most notably, it held that Section 253(a) was violated because the challenged requirements gave the city "unfettered discretion" over whether a company could

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[64] *RT Commc'ns*, 201 F.3d at 1268 (emphasis added).

[65] 305 F.3d 67, 76 (2d Cir. 2002).

[66] *Id.* (quoting *California Payphone*, 12 FCC Rcd at 14206 ¶ 31).

[67] *Id*. at 77.

[68] 380 F.3d 1258, 1269 (10th Cir. 2004).

[69] *Id.*

provide telecommunications service.[70] Following the Commission's *California Payphone* standard, the Tenth Circuit held that Section 253(a) was violated when the regulatory structure (which included, for example, broad discretion, vague "public interest" standards, and unlimited discretion to demand unidentified information) "denies telecommunications providers the 'fair and balanced legal and regulatory environment' the [1996 Act] was designed to create."[71]

The First Circuit has adopted the same standards as the Commission, Second Circuit, and the Ninth Circuit's initial *Auburn* formulation. In *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, the First Circuit held that a requirement "does not need to be complete or 'insurmountable' to run afoul of [Section] 253(a)."[72] It has also adopted the Commission's formulation that a requirement has the effect of prohibiting telecommunications if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[73]

2. Recent Decisions Take an Improperly Narrow View of Section 253 and Undermine Competition

Unfortunately, a few courts have issued decisions that conflict with the cases recognizing that Section 253(a) does not require an insurmountable barrier to entry, and those decisions have diminished the impact of Section 253 to help promote deployment and competition, as Congress intended.

In *Level 3 Communications, L.L.C. v. City of St. Louis*, the Eighth Circuit took issue with what it viewed as the First and Ninth Circuits' focus on preemption of requirements that "may"

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[70] *Id.* at 1270.

[71] *Id.*

[72] 450 F.3d 9, 18 (1st Cir. 2006) (quoting *City of White Plains*, 305 F.3d at 76).

[73] *Id.*

have the effect of prohibiting telecommunications service.[74] The Eighth Circuit asserted that a company must show "actual or effective prohibition, rather than the mere possibility of prohibition."[75] Although the Eighth Circuit gave lip service to the proposition that a plaintiff need not show a complete or insurmountable prohibition,[76] in its analysis, it rejected Level 3's claims because Level 3 could not show sufficiently specific telecommunications services that it had not been able to provide as a result of the challenged requirements.

The Eighth Circuit's stringent standard was then further tightened by the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*.[77] In *Sprint*, the Ninth Circuit, *en banc*, reversed its earlier *City of Auburn* decision and adopted the standard articulated in *Level 3*.[78] Indeed, the Ninth Circuit went farther, asserting that to succeed in a "facial" challenge under Section 253, a company must show that there is "no set of circumstances" under which the challenged requirement would be lawful.[79] In other words, to succeed, a provider would have to prove an absolute prohibition under all potential circumstances. The Ninth Circuit was wrong.

Contrary to the Ninth Circuit's citation, the U.S. Supreme Court has criticized and not followed the "no set of circumstances" test for facial "preemption" challenges. The Supreme Court originated the "no set of circumstances" test, known as the *Salerno* standard, to ensure that federal statutes were not invalidated based solely on speculation or outlier applications.[80]

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[74] 477 F.3d 528 (8th Cir. 2007).

[75] *Id.* at 533.

[76] *Id.* at 534.

[77] 543 F.3d 571 (9th Cir. 2008).

[78] *Id.* at 577-78.

[79] *Id.* at 579.

[80] *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also* Michael C. Dorf, *Facial Challenges to State & Fed. Statutes*, 46 STAN. L. REV. 235, 239-40 (1994).

However, the standard has been criticized for imposing insurmountable barriers to litigants seeking to challenge state or local laws that conflict with federal law—precisely as it does here.[81] Indeed, the Supreme Court has frequently not followed the *Salerno* standard used by the Ninth Circuit. In *Arizona v. United States*, the majority declined to apply *Salerno*.[82] In the majority's view, the relevant inquiry was whether the challenged state law interfered with federal objectives, not whether the court could conjure up a hypothetical scenario in which the state law may be validly applied.[83] That approach—focusing on interference with federal objectives—was used in *City of Auburn* and is appropriate for the Commission in the application of Section 253 as well.

The criticism in *Sprint* that *City of Auburn* relied on a misquote of Section 253(a) through the use of ellipses also misstates the basis for the Ninth Circuit's standard in *City of Auburn*.[84] *City of Auburn* made clear that its analysis was not based on the "mere possibility" that the challenged requirements "may" have the effect of prohibiting service. Rather, the court looked at the requirements as a whole, stating "our conclusion is based on the variety of methods and bases on which a city may deny a franchise, *not the mere franchise requirement, or the possibility of denial alone*."[85] Indeed, in *City of Auburn*, the court correctly recognized that the preemption issue was whether the local requirement stood "as an obstacle to the accomplishment and

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[81] *See, e.g.*, *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (op. of Stevens, J., respecting the denial of petition for certiorari) (noting that "*Salerno's* rigid and unwise dictum has been properly ignored in subsequent cases"); Dorf, *supra* note 80.

[82] *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2009).

[83] *Id.*

[84] *Sprint*, 543 F.3d at 576 (criticizing *City of Auburn* use of ellipses).

[85] 260 F.3d at 1176 n.11 (emphasis added) (citing *AT&T Commc'ns of Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997)).

execution of the full purposes and objectives of Congress," rather than using the inappropriate "no set of circumstances" approach.[86]

The standard for evaluating Section 253 claims articulated in *City of Auburn*, as well as in *City of Santa Fe* and *City of White Plains*, correctly reflects both the language and purpose of Section 253(a). The narrow reading in *Sprint* and *Level 3* fundamentally eliminates the language of Section 253(a) that preempts local regulations that "have the effect" of prohibiting. Rather, those courts functionally require a provider to demonstrate that a challenged requirement actually has prohibited the provision of service, or will actually prohibit the provision of all service in all circumstances. In so doing, the courts essentially eliminated the language of Section 253(a) that preempts both requirements that "prohibit" but also those that "have the effect" of prohibiting.

There is no doubt that the decisions by the Eighth and Ninth Circuits have had a significant chilling effect on deployment. Local governments in those Circuits and others have been led to believe that they can impose extensive, burdensome, and discriminatory requirements that effectively prohibit deployment, without concern. As the data and examples discussed above, and elsewhere in these comments demonstrate, contrary to Congress' intent, local governments are imposing discretionary, burdensome, and time-consuming regulation that effectively allow local governments to pick-and-choose which providers and which technologies enter the market and succeed—precisely the opposite of what Section 253 and the 1996 Act were meant to achieve.

Local governments may argue that anything short of an outright denial is not a "prohibition" under Section 253(a), but that ignores the regulatory scheme that Congress created with Section 253, as a whole, and it ignores the effect of unreasonable or discriminatory local

[86] *Id.* at 1180 (citation omitted).

regulations. The narrow focus of *Sprint* and *Level 3* also misses the effect of the inconsistent patchwork of local regulations. Telecommunications networks are designed and built as regional, statewide, and even national level networks. Wireless networks in particular, because of the nature of radio frequencies, must be designed as interlocking, interrelated wholes. Radio frequencies do not stop at municipal boundaries. Yet, the current situation is that every neighboring jurisdiction imposes its own regulations, which often conflict with each other. What one municipality may prefer, its neighbor may prohibit. Indeed, many communities even essentially dictate technology by insisting on particular equipment sizes or configurations. The result is untenable for providers. The "patchwork quilt" of regulation prevents providers from deploying a network with scale and uniform technology. The Commission recognized this very point in one of its earliest Section 253 cases:

> Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. ***They are statewide, national and international as well***. . .. [A]n array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition. . .. *Such a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers*, and thus adversely affect the economics of their competitive strategies.[87]

Indeed, providers know which communities are problematic and may avoid them altogether. Such indirect barriers to entry are particularly pernicious, yet are essentially impossible to prove to the satisfaction of a court imposing the approach taken in *Sprint*.

For all those reasons, the Commission should exercise its role as the expert agency empowered to interpret and enforce the Communications Act to resolve the ambiguity created by

[87] *TCI Cablevision*, 12 FCC Rcd at 21440-42 ¶¶ 102-106 (emphasis added) (internal quotation marks omitted); *see also Puerto Rico Tel.*, 450 F.3d at 18-19 (recognizing likely impact of gross revenue fees across multiple jurisdictions).

the Eighth and Ninth Circuits and clarify the correct interpretation of Section 253(a). Indeed, as the Commission recognized in the *Texas PUC Order*, it is obligated to act:

> [S]ection 253 expressly empowers -- indeed, ***obligates*** -- the Commission to remove any state or local legal mandate that "prohibits or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. ***We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service***.[88]

Likewise, Section 706 of the 1996 Act requires the Commission to act to "remove barriers to infrastructure investment."[89]

B. The Commission Should Define Actions that Effectively Prohibit the Provision of Telecommunications Services

The current situation under the Eighth Circuit's and Ninth Circuit's decisions would force providers to prove, on a city-by-city and location-by-location basis, that local requirements make it impossible to provide any telecommunications services under any circumstances, regardless of the cost, burden, delay, or impact on the ability to design and build a network beyond that local area. The cost, delay, and uncertainty of litigation make such a situation untenable. The Eighth Circuit's and Ninth Circuit's interpretation has effectively neutered Section 253 and in so doing thwarted the pro-deployment, pro-competitive, deregulatory intent of the 1996 Act.

The deployment of new technologies and competitive services requires a significant capital investment—potentially millions of dollars for each community. Simply to undertake the design stage of a small wireless facility network requires significant expense and investment. Uncertainty resulting from wholly subjective, discretionary local requirements creates so much

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[88] *Texas PUC Order*, 13 FCC Rcd at 3470 ¶ 22 (emphasis added).

[89] 47 U.S.C. § 1302(a).

risk that companies may not even undertake the investment involved in planning for new services in communities that assume they are authorized to deny consent or impose significant burdens on consent. Moreover, the expense of complying with local application and information requirements may alone be prohibitive. And delays of a year or more, coupled with the uncertainty of whether the network will be built at all in the end, will deter or prevent investment in new technologies and competitive services. Likewise, the cumulative effect of local requirements can create a prohibition of service, even if any one of the requirements, alone, may not completely prohibit service. For example, the First Circuit recognized that the cumulative effect of multiple cities adopting a revenue-based fee would prohibit the provision of telecommunications service.[90]

New entrants, including WIA's members, who are deploying new, advanced technologies, are particularly negatively affected by delay and uncertainty. This is not to say that delay and uncertainty are acceptable for established companies—clearly they are not—but for a new entrant the ability to deploy promptly and begin achieving revenues could be the difference between financial survival and failure.[91] Having to navigate the multiple layers and multiple years of delay and uncertainty imposed by ordinances, such as those identified above, before even achieving standing to challenge the requirements are devastating to deployment and

[90] *Puerto Rico Tel.*, 450 F.3d at 18-19.

[91] *Minnesota Order*, 14 FCC Rcd at 21708-09 ¶ 21 (holding that enforcement of the buildout requirements would have the effect of prohibiting certain carriers from providing any telecommunications service contrary to section 253(a) because "the substantial financial investment" required to meet the build-out requirement effectively precluded any entry at all); Remarks of FCC Commissioner Ajit Pai on the Need for a Digital Empowerment Agenda, at 3, Think Big Partners, Kansas City, MO (Oct. 11, 2016) ("[I]n many cities, the job is made even harder by municipalities that take months to grant a local franchise. Others have imposed moratoriums on the construction of new small wireless facilities. Regulatory hurdles like these slow down deployment and sometimes deter [competitive entities] altogether.").

innovation. Companies cannot afford to spend months or years and tens or hundreds of thousands of dollars to pursue an access application just to develop a record that would then require many more months or years and hundreds of thousands of dollars to litigate. That interpretation itself would thwart Congress' policy goal of prompt deployment of competitive services and new technologies. Instead, Section 253 must be able to proactively eliminate local overreaching to provide certainty and improve speed to market.

1. The Commission Should Declare that Any Requirement on Small Wireless Facilities that Subjects Deployment to a Different Process than Other Rights-of-Way Pole Users Violates Section 253(a)

To remedy the current conflicts in the interpretation of Section 253(a), the Commission should declare that—at a minimum—local regulations that impose different, more burdensome requirements and conditions on small wireless facilities than all other telecommunications providers in the public rights-of-way violate Section 253(a).[92]

As demonstrated above, a significant barrier to deployment of small wireless facilities in the public rights-of-way is the widespread local government practice of regulating them differently than all other telecommunications providers (or even electric utilities). Repeatedly, WIA members encounter local governments that allow installation of telecommunications and other utility facilities on utility poles in the public rights-of-way subject only to permits that are granted on a ministerial basis, frequently "over the counter." Indeed, some cities require no

[92] These comments will not focus on the corollary question of whether such discriminatory regulations are "saved" by Section 253(c). It is axiomatic that if the requirements are a Section 253(a) violation because they are discriminatory, by definition they are not "competitively neutral" or "nondiscriminatory" management of the public rights-of-way under Section 253(c). *E.g.*, *Zayo Grp., LLC v. Mayor & City Council of Balt.*, No. JFM-16-592, 2016 WL 3448261, at *7 (D. Md. Jun. 14, 2016) ("[T]he purported disparity in treatment between Verizon and its competitors, shows that the City's action may be neither competitively neutral nor nondiscriminatory."); *City of White Plains*, 305 F.3d at 80.

permit whatsoever before installation on existing utility poles.[93] Yet, those same communities refuse to apply the same rules if there is an antenna involved. Rather, when equipment is "wireless" in nature, those communities demand that "wireless" equipment on utility poles in the right-of-way be subject to myriad additional requirements and/or limitations, including discretionary aesthetic zoning permit requirements and limits on the ability to deploy in residential areas.

Fundamentally, those communities are discriminating in favor of one telecommunications technology—wireline—against companies that incorporate wireless technology to compete. And there can be no dispute that wireless technologies and services compete directly with wireline. The most recent government report shows that nearly 50% of all U.S. households have cut the cord, using wireless technology in lieu of any landline telephone service.[94]

Yet, as the Commission and multiple courts have recognized, the 1996 Act was intended to promote competitive technologies and prevent local governments from influencing market entry and success. The Commission should act now to stop this most obvious and fundamental barrier to deployment of wireless telecommunications in the public rights-of-way.

Indeed, such a declaration by the Commission would be consistent with the Commission's repeated prior holdings that Section 253 prohibits local governments from discriminating against new entrants or new technologies. The Commission's *California Payphone* standard should be declared to be the correct interpretation of Section 253(a): a local

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[93] *See, e.g., T-Mobile West Corp. v. City & Cnty. of San Francisco*, No. CGC-11-510703, at 9 (Super. Ct. S.F. Cty. Nov. 26, 2014) (order overruling objections to proposed statement of decision).

[94] Stephen J. Blumberg & Julian V. Luke, National Center for Health Statistics, "Wireless substitution: Early release of estimates from the National Health Interview Survey, January–June 2016," (Dec. 2016), http://www.cdc.gov/nchs/nhis.htm.

requirement effectively prohibits the provision of telecommunications service in violation of Section 253(a) if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[95] The Commission should also reiterate its holding in the *Texas PUC Order* that Section 253(a) bars state or local requirements that restrict the means or facilities through which a party is able to provide service, and moreover, that it bars local requirements that impose financial burdens on one set of providers that are not imposed on others.[96]

Indeed, the Commission has previously concluded that costs imposed only on new entrants are classic barriers to entry.[97] In a 1994 order implementing the 1992 Cable Act, the Commission defined a barrier to entry as "'a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry.'"[98] And the Ninth Circuit has held that "[t]he disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier."[99] In its *Amicus Curiae* brief in *White Plains*, the Commission asserted that "[d]iscriminatory entry conditions . . . make

[95] *California Payphone*, 12 FCC Rcd at 14206 ¶ 31; *see also Texas PUC Order*, 13 FCC Rcd at 3470 ¶ 22.

[96] *Texas PUC Order*, 13 FCC Rcd at 3466 ¶ 13; *see also Minnesota Order*, 14 FCC Rcd 21708-09 ¶ 21.

[97] *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 7442, Appendix H at 7621-22 ¶ 29 (1994).

[98] *Id.* (quoting G. Stigler, The Organization of Industry 67 (1968)).

[99] *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 (9th Cir. 1993).

competitive entry more difficult and unlikely, thereby undermining the local competition Congress sought to foster."[100]

Such a declaration is also supported by multiple courts. For example, the Southern District of New York, in *Montgomery County v. Metromedia Fiber Network, Inc*., held that

> *subjecting new market entrants . . . to a lengthy and discretionary application process, while exempting the incumbent provider. . . from such process, has the effect of prohibiting the provision of telecommunications services*, because it "materially inhibits or limits the ability" of the new entrant "to compete in a *fair and balanced* legal and regulatory environment."[101]

Similarly, the First Circuit explained that

> Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. Section 253(a) takes that choice away from them, thus preventing state and local governments from standing in the way of Congress's new free market vision.[102]

Accordingly, there is ample support for a Commission declaration that local requirements that are imposed only on wireless equipment in the right-of-way violate Section 253.[103] In this case, WIA's members seeking to deploy a new technology in the right-of-way are the "new entrant" group that the 1996 Act intended to protect.

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[100] Brief for Federal Communications Commission and the United States as Amici Curiae, *TCG N.Y., Inc. v. City of White Plains*, No. 01-7213, 2001 WL 34355501, at *8 (2d Cir. filed June 13, 2001) ("FCC Br. in *City of White Plains*").

[101] 326 B.R. 483, 494 (S.D.N.Y. 2005), *vacated and remanded pursuant to joint motion* (05-4123) (Aug. 31, 2006) (first emphasis added).

[102] *Cablevision of Boston*, 184 F.3d at 98.

[103] As noted above, such discriminatory requirements would violate not only Section 253(a), but would not be competitively neutral and nondiscriminatory, as required by Section 253(c).

a. Specify that Zoning Requirements Not Imposed on Other Right-of-way Occupants Cannot Be Imposed on Wireless Equipment

The Commission should also specifically clarify that certain common types of discriminatory regulations violate this standard. For example, the Commission should declare that local governments cannot require companies installing small wireless facilities in the public rights-of-way to first obtain approval under the local zoning code when other telecommunications providers are not required to obtain the same approval. As discussed above, many communities require that a small wireless facility installation obtain discretionary zoning approval before it can be installed in the public rights-of-way, even though other equipment, such as fiber boxes, electric transformers, or even poles themselves, are not required to obtain any such approval before deployment in the public rights-of-way. Such requirements materially inhibit and limit the ability of one set of providers to compete in a fair and balanced regulatory environment. Companies that use wireless technology must incur the significant expense and suffer the delays involved in the discretionary zoning process, which the incumbent wireline provider does not incur. Accordingly, those local governments are giving non-wireless technologies an automatic cost-based advantage. And critically, the providers deploying wireless technologies risk denial altogether based on subjective, discretionary grounds that wireline competitors do not face.

The discriminatory imposition of zoning requirements is particularly pernicious in residential areas. Deployment of small wireless facilities in the rights-of-way is a key element of providing wireless broadband service to consumers in their homes.[104] Yet, many communities

[104] *See, e.g.*, *Public Notice*, 31 FCC Rcd at 13360-64; WIA, Small Cells on Pole Facilities, 2016, http://wia.org/wp-content/uploads/WIA-ITC-Pole-Attachment2016final.pdf.

use their zoning code to exclude wireless equipment from residential zones altogether—while wireline providers are allowed to deploy in the right-of-way with only ministerial permits and no zoning approval. The Commission should confirm that local laws imposing zoning only on small wireless facilities in the public rights-of-way, particularly if they effectively exclude small wireless facilities from serving residential areas in competition with wireline providers, constitute an effective prohibition of telecommunications service in violation of Section 253 and not "saved" by Section 253(c).

b. Specify that Fees Imposed Only on Wireless Equipment or Fees on Wireless Equipment that Exceed the Fees Imposed on Other Telecommunications Providers Violate Section 253

Likewise, the Commission should explicitly declare that local governments cannot impose fees on wireless equipment that are greater than, or otherwise not imposed on, all other communications providers. As discussed above, it is overwhelmingly common for communities to seek to profit from the deployment of wireless facilities in the public rights-of-way with fee demands not imposed on other telecommunications providers. Such impositions obviously materially inhibit and limit the ability of one set of companies to compete in a competitively neutral environment. As the Second Circuit recognized in *White Plains*, the local government is giving one provider an inherent competitive cost advantage based solely on discriminatory local requirements:

> If TCG is required to pay five percent of its gross revenues to the City and Verizon is not, competitive neutrality is undermined. Verizon will have the advantage of choosing to either undercut TCG's prices or to improve its profit margin relative to TCG's profit margin. Allowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals of the TCA.[105]

[105] *City of White Plains*, 305 F.3d at 79 (citing Preamble, 104 P.L. 104, 110 Stat. 56); *see also Minnesota Order*, 14 FCC Rcd at 21713-14 ¶¶ 28-29.

When cities seek to demand payments for occupation of the public rights-of-way by "wireless" equipment that exceeds the payments demanded of other telecommunications providers who occupy utility poles in the same rights-of-way—or worse, where no fee is required of other telecommunications providers at all—it effectively prohibits the provision of telecommunications services. As discussed above, such discriminatory demands conflict with the language and policy of Section 253 and the 1996 Act.

2. The Commission Should Declare that the Eighth and Ninth Circuits Misinterpret Section 253(a) by Failing to Recognize Requirements that "Have the Effect" of Prohibiting Service.

In addition to addressing discriminatory treatment, the Commission should also declare that the Eighth Circuit and Ninth Circuit were incorrect in their adoption of an overly narrow interpretation of Section 253(a). Specifically, the Commission should declare that Section 253(a) does not require a total ban on service, as essentially required by the Eighth and Ninth Circuits. Rather, the Commission should declare that the standard based on the Commission's *California Payphone* standard as reflected in the Ninth Circuit's original *City of Auburn* decision, and the companion standards used by the First and Second Circuits and various district courts, are the correct interpretations of Section 253(a).

Such a declaration would be consistent with the Commission's and several courts' recognition that Section 253 is a broad limit on municipal authority, not the narrow preemption reflected in *Sprint* and *Level 3*. Section 253(a) was intended as a sweeping preemption of local government entry regulation. "Through this provision, Congress sought to ensure that its national

competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states."[106]

The Commission should declare that Section 253(a), and particularly the term "prohibit," cannot be read in a vacuum. Rather, the interpretation of Section 253(a) must reflect the regulatory scheme set forth in Section 253 as a whole.[107] Specifically, the structure of Section 253 as a whole reflects Congress' intention that States and localities' authority would be preserved in only specific, narrow areas. Local governments were left only the narrow authority to manage the public rights-of-way and to require fair and reasonable compensation from telecommunications providers, all on a competitively neutral and nondiscriminatory basis under Section 253(c).[108]

By narrowly limiting municipalities to managing rights-of-way, Section 253 achieves the "virtually absolute" preemption of municipal regulatory authority Congress intended.[109] As articulated in *AT&T Communications of the Southwest, Inc. v. City of Dallas*, Section 253 "limits the scope of [the municipality's] authority to regulate telecommunications to two narrow areas: the 'management' of city rights-of-way, and the requirement of fees for use of rights-of-way."[110]

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[106] *Texas PUC Order*, 13 FCC Rcd at 3463 ¶ 4.

[107] *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."); *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, [courts] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

[108] 47 U.S.C. § 253(c).

[109] *City of Auburn*, 260 F.3d at 1775.

[110] 8 F. Supp. 2d 582 (N.D. Tex. 1998) ("*Dallas I*"). The court subsequently granted a second injunction in favor of a wireless telecommunications provider, 52 F. Supp. 2d 756 (N.D. Tex. 1998) ("*Dallas II*"), and finally granted summary judgment and a permanent injunction against Dallas' imposition of various service requirements and fees. 52 F. Supp. 2d 763 (N.D. Tex. 1999) ("*Dallas III*"). The Fifth Circuit vacated the district court's decision on the grounds that it was made moot by a subsequent state statute which required the city to repeal the ordinance.

And, quoting the Commission's *Classic Telephone, Inc.*, the court emphasized that "'Congress intended primarily for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers . . . .' ***Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications***."[111] As a result, cities cannot place conditions on approval for access to the public rights-of-way for telecommunications services, "other than those related to the use of rights-of-way."[112] A city may not "grant or deny [access to the rights-of-way] based on its own discretion. Rather, granting [access to the rights-of-way] may only be conditioned on a company's agreement to comply with the city's reasonable regulations of its rights-of-way and the fees for use of those rights-of-way."[113]

The Commission should follow those cases and declare that the analysis and standard articulated originally in *City of Auburn* and *Dallas I*, among others, are correct. As discussed above, the Commission should declare that Section 253(a) does not require that a local requirement be "insurmountable." Moreover, the Commission should hold that the Ninth Circuit correctly held that Section 253 preempts certain municipal application and substantive requirements, including:

- A lengthy and detailed application form, requiring disclosure of matters such as:
  - maps,
  - corporate policies,
  - documentation of licenses,
  - financial, technical, and legal qualifications,
  - a description of all services provided currently or in the future,

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AT&T Commc'ns of Southwest, Inc. v. City of Dallas, 243 F.3d 928 (5th Cir. 2001). The district court's widely followed reasoning, however, remains sound and applicable.

[111] *Dallas I*, 8 F. Supp. 2d at 591 (emphasis added) (internal quotations and footnote omitted).

[112] *Id.* at 593; *see also PECO Energy Co. v. Twp. of Haverford*, No. 99-4766, 1999 WL 1240941, at *7 (E.D. Pa. Dec. 20, 1999); *Prince George's Cnty.*, 49 F. Supp. 2d at 817.

[113] *Dallas I*, 8 F. Supp. 2d at 592.

    - and "[s]uch other and further information as may be requested by the City"
- A requirement for a public hearing on the application;
- Discretionary factors that have nothing to do with the management or use of the right-of-way;
- Regulations governing the transferability of ownership, and even stock sales;
- Municipal reservation of discretion to grant, deny, or revoke the franchises, described by the court as "the ultimate cudgel";
- Reporting requirements regarding matters not directly related to management of the rights-of-way;
- "Most favored community" status regarding rates, terms and conditions of service; and
- Fees that are unreasonable or not limited to the city's cost of managing the provider's use of the public rights-of-way.

Finally, the Commission should confirm these and other requirements are not related to management of the rights-of-way. As *City of Auburn* recognized, the argument that "management" of the right-of-way allows cities to broadly regulate all aspects of the facilities in the right-of-way is a "semantic two-step" under which "the safe harbor provisions would swallow whole the broad congressional preemption."[114] Rather, the Commission should reiterate the declaration in *Classic Telephone, Inc.*, as also recognized by courts, that the right-of-way management tasks reserved to municipalities are limited and include only matters such as "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[115] The discretionary role cities now seek to enforce is not management of the public right-of-way as envisioned by Congress.

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[114] *City of Auburn*, 260 F.3d at 1180.

[115] *Dallas I*, 8 F. Supp. 2d at 591-92 (citing *TCI Cablevision*, 12 FCC Rcd at 21441 ¶ 103 and *Classic Tel., Inc.*, 11 FCC Rcd at 13082 ¶ 40); *see also Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 20227 (1996).

3. The Commission Should Clarify that Section 253 Applies to Small Wireless Facility Deployment in Public Rights-of-Way and that the Standard Under Section 253 Is Not the Same as the Judicially-Created Standard Currently Applied Under Section 332(c)(7)(B)

a. Section 253 Is Applicable

The Commission should clarify that Section 253 is relevant and applicable to deployment of small wireless facilities in the public rights-of-way, and that the relevant standard is not the same as the standard applied by courts under Section 332(c)(7)(B).

First, Section 253 is applicable to the deployment of small wireless facilities and other wireless facilities in the public rights-of-way. Section 253(a) preempts any local government requirement that has the effect of prohibiting "***any*** entity to provide ***any*** interstate or intrastate telecommunications service."[116] As the Supreme Court has recognized, the provision of telecommunications services via wireless technologies is still "telecommunications service."[117] As a result, Section 253(a) applies to the deployment of telecommunications services that use wireless facilities.

Local governments have argued that Section 332(c)(7) alone governs local regulation of the deployment of personal wireless services facilities. However, courts have rejected that argument. Section 332(c)(7) is a vehicle for appealing the denial of a specific, individual zoning application, but Section 253 is the appropriate provision for challenges to the fundamental requirements imposed by local government. In *Cox Communications PCS, L.P. v. City of San Marcos*, the district court specifically distinguished between Section 253, which "provides a cause of action against *local regulations*," and Section 332(c)(7), which "gives a cause of action

[116] 47 U.S.C. § 253(a) (emphasis added).

[117] *NCTA v. Gulf Power Co.*, 534 U.S. 327, 340-42 (2002).

against *local decisions*."[118] Thus, Section 332 would apply if a provider has applied for a specific zoning approval and been denied.

Some cities have even argued that their local zoning regulations are immune from Section 253 scrutiny altogether. But that position has been explicitly rejected.[119] There is no basis for the argument that Congress left local zoning authority untouched and without limits.

The Commission in this situation is addressing the fundamental requirements and authority of local governments. Thus, Section 253 is the appropriate statutory provision.

b. The Standard Under Section 253(a) Is Not the Same as the Judicially-Created Standard Applied in Section 332(c)(7)(B)(i)(II) Cases

The Commission should also make clear that the analysis of municipal requirements under Section 253 is not the same as the judicially-created standard for an "effective prohibition" of personal wireless service that is currently used in Section 332(c)(7)(B)(i)(II) cases. The Ninth Circuit in *Sprint* mistakenly asserted that the standard for whether a local requirement has the effect of prohibiting telecommunications service under Section 253(a) is the same as the judicially-created test for whether denial of a wireless siting application effectively prohibits personal wireless service under Section 332(c)(7)(B)(i)(II).[120] Indeed, the Commission appears to have confused the issue somewhat in questions raised in the *Public Notice*.[121] The Commission

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[118] *Cox Commc'ns PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D. Cal. 2002); *see also USCOC of Greater Mo., L.L.C. v. Vill. of Marlborough*, 618 F. Supp. 2d 1055, 1065 (E.D. Mo. 2009).

[119] *See, e.g., Verizon Wireless (VAW) LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1335-39 (D.N.M. 2007) (rejecting city's argument that local zoning regulations are immune from Section 253 challenge).

[120] *Sprint*, 543 F.3d at 579.

[121] *Public Notice*, 31 FCC Rcd at 13370-71.

should correct the confusion and clarify that the standard under Section 253(a) is not the same standard currently applied in Section 332(c)(&)(B)(i)(II) cases.

First, the Section 332(c)(7) standard, which requires the showing of a significant gap in coverage and that the proposed tower is the least intrusive means of remedying the gap, is meaningless and unworkable in the context of a multi-location telecommunications network, particularly one that does not involve wireless facilities or services. It would be impossible for a purely wireline-based deployment, for example, to meet that standard—and no court has ever suggested that Section 253 requires any such showing. The Commission should clarify that the Section 332 standard was judicially-created to deal with traditional tall towers on private property where one antenna can serve a large area. The area covered by the average small wireless facility is only a few hundred feet.[122] The Commission should clarify that imposition of a judicially-crafted standard for towers onto small wireless facilities in the right-of-way is improper.

Moreover, the Section 332 "effective prohibition" standards are not uniform among the Courts of Appeals. For example, the First Circuit has required the plaintiff to show that there is "no feasible alternative" to the proposed facility.[123] Again, that standard is meaningless in the context of a telecommunications network in the public rights-of-way. Second, and more importantly, the Commission and various courts have rejected the argument that Section 253(a) requires a showing that the challenged requirement is insurmountable. In the *Minnesota Order*, the Commission explicitly rejected the argument that the availability of alternative rights-of-way

[122] *See, e.g., Public Notice*, 31 FCC Rcd at 13363 n.17 (recognizing limited coverage of small wireless facilities).

[123] *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 50 (1st Cir. 2009).

(*i.e.*, theoretically feasible alternatives) meant that the state's requirement did not effectively prohibit service in violation of Section 253(a).[124] As demonstrated above, the Commission and courts have repeatedly recognized that local requirements violate Section 253(a) when they impose greater expense or burden.

Finally, a standard that would effectively allow local governments to deny small wireless facility deployment in the public rights-of-way on the theory that some other "alternative" may exist would allow those local governments to pick-and-choose technologies and services. But as discussed above, the 1996 Act and Section 253 were adopted specifically to remove local governments from that role. Congress intended the market and technological innovation to control market entry.

c. The Discrimination Standard Under Section 253 Is Not the Same as Under Section 332(c)(7)(B)(i)(I)

Finally, the Commission should also make clear that the discrimination analysis under Section 253 is not the same as the issue under Section 332(c)(7)(B)(i)(I) of whether denial of a specific wireless facility application "unreasonably discriminates among providers of functionally equivalent services." As a threshold matter, Section 253 does not include the same terms as Section 332(c)(7)(B)(i)(I). Section 253(c) states that the local management of the right-of-way must be both "competitively neutral ***and*** nondiscriminatory." 47 U.S.C. § 253(c) (emphasis added). Section 253 has no modifier regarding whether the discrimination is "reasonable," nor any consideration of "functionally equivalent services." Thus, from a purely linguistic basis, Section 253 does not have the same modifiers as Section 332(c)(7)(B)(i)(I) and should not be deemed to be the same.

[124] *Minnesota Order*, 14 FCC Rcd at 21709-10 ¶ 23.

The very purpose of Section 253 was to prevent discrimination among telecommunications providers—regardless of technology. If local governments are allowed to discriminate against small wireless facilities and other wireless providers in the public rights-of-way based on arguments that the equipment is not identical in every respect to the equipment used by incumbent wireline providers and thus not "similarly situated," then local governments would be allowed to fundamentally discriminate against competitors using new, advanced technologies. Such a situation is anathema to the language and intent of Section 253 and the policies of the 1996 Act, as a whole.

In addition, it is important to dispel any myth that wireless services and facilities do not compete with or are not "functionally equivalent" to incumbent wireline providers. Consumer data overwhelmingly demonstrates that mobile devices directly compete with "traditional" wireline telecommunications services. Essentially half of adults in the country live in "wireless only" households that have cut the cord and no longer subscribe to landline telephone service.[125] Local government regulations must recognize that reality and treat wireless deployment in the public rights-of-way in the same, largely ministerial manner as wireline technologies.

C. The Commission Should Act to Prevent Delay

As discussed above, WIA members continue to encounter significant delays in deployment of small wireless facility in the public rights-of-way. WIA members have reported nearly half of all communities took longer than the longest time identified by the Commission in the *Shot Clock Order* as a reasonable time to install an all new macro tower. Those examples demonstrate that cities continue to significantly delay deployment of wireless in the public

[125] Stephen J. Blumberg & Julian V. Luke, National Center for Health Statistics, "Wireless substitution: Early release of estimates from the National Health Interview Survey, January–June 2016," (Dec. 2016), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201612.pdf.

rights-of-way, and support a Commission declaration that defines shorter time frames and stronger enforcement remedies.

1. The Commission Should Declare that Delay Effectively Prohibits Provision of Telecommunications Service in Violation of Section 253

As a threshold matter, the Commission should declare that delay effectively prohibits the provision of telecommunications service in violation of Section 253. This should be axiomatic. While small wireless facility applications wait months and even years for municipal approval, the provider is effectively prohibited from providing telecommunications services in violation of Section 253(a).[126] But the damage goes beyond even that delay period. Even if the local government eventually grants the application, during the delay, the provider was prevented from competing with incumbent wireline providers. In an industry where technology changes constantly and consumers demand immediate access to the most recent technologies and services, delays of a few months, much less years, are unacceptable and can fundamentally harm a company's ability to compete and succeed in the long term and even beyond the particular local jurisdiction. Thus, municipal delay is fundamentally thwarting the purpose of the 1996 Act.

This concept is well established. In *TCG New York, Inc. v. City of White Plains*, the Second Circuit affirmed the District Court's ruling that the City's unreasonable delay in allowing TCG to access the public rights-of-way had the effect of prohibiting TCG from providing telecommunications services in violation of Section 253(a).[127] Likewise, in *City of Austin*, the court recognized that the present telecommunications marketplace is highly competitive and constantly changing, and as a result, even the slightest delay can cause a provider to lose

[126] *See AT&T Commc'ns of Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997), *vacated on other grounds*, 235 F.3d 241 (5th Cir. 2000).

[127] 305 F.3d 67, 76 (2d Cir. 2002).

significant opportunities as compared to those already operating in the market.[128] In *Township of Haverford,* the court held that the challenged ordinance violated Section 253, among other reasons, because there was no guarantee that a franchise application "once submitted, will be processed ***expeditiously***."[129]

The Commission likewise has recognized the potential adverse effects of local government delay. In the second *Classic Telephone, Inc.* Order, addressing the defendant cities' failure to act under the Commission's first order, the Commission explained:

> If a potential entrant is unable to secure the necessary regulatory approvals within a reasonable time, it may abandon its efforts to enter a particular market based solely on the inaction of the relevant government authority . . . . More specifically, in certain circumstances a failure by a local government to process a franchise application in due course may "have the effect of prohibiting" the ability of the applicant to provide telecommunications service, in contravention of section 253.[130]

The Commission should therefore declare that a locality violates Section 253(a) when it causes delay for a small wireless facility construction.

2. The Commission Should Declare that for Small Wireless Facilities in the Public Rights-of-Way on an Existing Pole, the Maximum Reasonable Time for Action is 60 Days

In the Public Notice the Commission asks whether the presumptive timeframes adopted in the *Shot Clock Order* reflect an approach more appropriate for traditional macrocells than for small wireless facilities. And specifically, the Commission asks whether its interpretation of a "reasonable period of time" should be shorter for review of small wireless facility

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[128] 975 F. Supp. at 938.

[129] 1999 WL 1240941, at *8 (emphasis added).

[130] *Classic Tel., Inc.*, 12 FCC Rcd 15619, 15634 ¶ 28; *see also TCI Cablevision*, 12 FCC Rcd at 21441 ¶ 105 (FCC concerned with "unnecessary delays" caused by local governments).

applications.[131] The Commission should declare a reasonable period of time for local government review of an application to deploy small wireless facilities is 60 days.

As a threshold matter, it is important to put this issue into perspective. The typical time for a local government to review and grant an application to deploy a fiber optic based CLEC network in the public rights-of-way is just a matter of a few days, or a few weeks at most. There is generally no element of aesthetic review, zoning, or other time-consuming evaluation. Indeed, such right-of-way permits are typically granted on an administrative, ministerial basis.

Moreover, the equipment installed when WIA's members deploy small wireless facilities is essentially identical in size and appearance to the other communications and utility equipment that is deployed on poles in the public rights-of-way. For example, in an industry challenge to the City of San Francisco's wireless right-of-way ordinance, based on evidence of the deployments in the public rights-of-way by T-Mobile, Crown Castle, and ExteNet compared to the equipment already installed on utility poles in the city by wireline telecommunications providers, the cable operator, and the electric utility, the trial court held that "the pieces of equipment, including antennas, installed on utility poles in the public right-of-way by Plaintiffs are generally similar in size and appearance to the pieces of equipment installed on utility poles in the public rights-of-way by other right-of-way occupants, including but not limited to PG&E, Comcast, and AT&T."[132] Indeed, the court held that AT&T and Comcast install equipment cabinets on utility poles that are "identical" to the cabinets used by T-Mobile, Crown Castle, and ExteNet for their small wireless facility installations.[133]

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[131] *Public Notice*, 31 FCC Rcd 13371.

[132] *T-Mobile West Corp. v. City & Cnty. of San Francisco*, No. CGC-11-510703, at 8 (Super. Ct. S.F. Cnty. Nov. 26, 2014) (order overruling objections to proposed statement of decision).

[133] *Id.* at 9.

Similarly, in a Crown Castle dispute with the City of Newport News, Virginia, the U.S. District Court for the Eastern District of Virginia found that the "equipment installed by Verizon, Dominion, and Cox is often similar in size ***and sometimes larger than*** the Crown Castle equipment attached at each of the four Node locations."[134] Moreover, the City had complained that to accommodate Crown Castle's nodes the utility pole owners, Dominion and Verizon, had changed out existing poles with new, taller poles. The City argued the installations were therefore "new" poles. Yet, the Court found that Dominion and Verizon regularly change out poles for their own equipment—without any zoning approval and without the City treating them as new poles.[135]

These cases demonstrate that the size and appearance of small wireless facility equipment and the methods of their construction are no different than the equipment already deployed on utility poles throughout the public rights-of-way. Accordingly, there is no basis for local authorities to claim that review of small wireless facility deployments requires lengthy and burdensome applications and reviews. Again, the only reason that local governments are treating these installations differently is because of the wireless nature of the equipment. Any assertion a local government may make about what they supposedly need to review is also true of all the other telecommunications and utility equipment in the public rights-of-way—which are identical in size and appearance.

Thus, even 60 days is a generous amount of time for a local government to act on a small wireless facility application—regardless of how many small wireless facilities are involved. An application for a small wireless facility network that may involve tens of small wireless facility

[134] *City of Newport News*, 2016 WL 4205355, at *8 (emphasis added).
[135] *Id*. at *13.

nodes can still be reviewed in a short time, so long as the local government applies the same standards it does for non-wireless equipment on the same poles. Accordingly, "batching" of multiple small wireless facility installations into a single application should be permitted, and should not be grounds for the local government to require more time. Local governments deal quickly with other telecommunications networks that involve attachment to tens or hundreds of poles without difficulty.

Ultimately, holding that 60 days is the maximum reasonable time for a local government to act on a small wireless facility application is consistent with the Commission's holding in its *2014 Wireless Infrastructure Order*. Although a new small wireless facility installation on an existing utility pole may not qualify as an "eligible facility request" if there is no previous wireless attachment, it is fundamentally similar to a collocation under Section 6409 of the Spectrum Act,[136] an application for which a municipality would have 60 days to act. In both cases, the largest intrusion into the right-of-way is the utility pole, which is already in place and has already been approved for telecommunications and utility attachments. There is nothing about the small wireless facility attachment that warrants special treatment—except the emission of radio frequencies, and Congress has clearly prohibited cities from regulating based on concerns about radio frequencies.[137] Indeed, in the *2014 Wireless Infrastructure Order*, the Commission repeatedly recognized that small wireless facilities can be installed "with little or no impact."[138] In excluding utility poles from historic preservation review requirements, the Commission stated:

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[136] *See* Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (codified at 47 U.S.C. § 1455(a)).

[137] 47 U.S.C. § 332(c)(7)(B)(iv).

[138] *2014 Wireless Infrastructure Order*, 29 FCC Rcd at 12866-67 ¶ 3.

> Utility structures are, by their nature, designed to hold a variety of electrical, communications, or other equipment, and they already hold such equipment. Their inherent characteristic thus incorporates the support of attachments, and their uses have continued to evolve with changes in technology since they were first used in the mid-19th century for distribution of telegraph services. Indeed, we note that other, often larger facilities are added to utility structures without review.[139]

Given these acknowledgements, the Commission should declare that, for small wireless facility installations on existing utility poles in public rights-of-way, the maximum reasonable time for action on an application is 60 days.

3. The Commission Should Provide Guidance that Violation of the Shot Clock Results in the Application Being Granted

An important corollary to the need to declare a shorter time as reasonable for processing of small wireless facility applications is that the Commission should declare that if a local government fails to act in the relevant reasonable period of time, the application is deemed granted. Despite the explicit requirement in Section 332(c)(7)(B)(v) that courts act on appeals under Section 332 on an expedited basis, and despite the explicit message in the 1996 Act that Congress intended to promote the rapid deployment of new, competitive technologies, and even despite the Commission's multiple clear statements regarding the importance of rapid deployment,[140] courts faced with shot clock claims have failed to provide a meaningful remedy. The worst example of this is *Up State Tower Co. v. Town of Kiantone*, where the Western

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[139] *Id.* at 12907 ¶ 91.

[140] Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (1996 Act was designed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and *encourage the rapid deployment of new telecommunications technologies*") (emphasis added); *see also* H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.) (purpose of 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed *to accelerate rapidly private sector deployment of advanced telecommunications and information* technologies and services . . .") (emphasis added).

District of New York held that the Town of Kiantone had failed to act on Up State Tower's application to install a new wireless tower in a reasonable period of time in violation of Section 332(c)(7)(B)(ii). Despite so holding, the court refused to issue an order requiring the Town to grant the application—which is the overwhelmingly recognized remedy for a violation of Section 332(c)(7)(B). Instead, the court gave the Town twenty days to issue a decision on the application—not to grant the application, but simply to act.[141] In other words, eighteen months after an application was filed, the court's "remedy" for the Town's failure to act in a timely manner was to give the Town *more time* to act. Indeed, the reality of the case is that the litigation took ten months for the court to merely return the application to the Town with only instructions to issue a decision. The *Up State Tower* court's decision reveals a troubling unwillingness to respect the purpose of Section 332(c)(7)(B)(ii), and highlights the need for more explicit direction by the Commission.

The Commission should take this opportunity to revise its finding in the *Shot Clock Order* and now declare that failure of a local government to act within the relevant reasonable period of time defined by the *Shot Clock Order* results in the application being deemed granted. Chairman Pai has expressed his concern that a deemed granted remedy is necessary, and he was

[141]No. 1:16-cv-00069, 2016 WL 717832 (W.D.N.Y. Dec. 9, 2016).

correct.[142] Only through identification of a clear remedy will Congress' mandate of expedited deployment be fulfilled.[143]

D. The Commission Should Clarify Limits on Local Fees Under Section 253

The Commission should also take this opportunity to issue a declaratory ruling limiting fees imposed by local governments for small wireless facilities in the public rights-of-way. Specifically, the Commission should declare that municipal fees for use of the public rights-of-way must be nondiscriminatory, limited to recovering the local government's reasonable costs directly related to managing the provider's occupation of the rights-of-way, and publicly disclosed in advance.

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[142] *See, e.g.,* Commissioner Pai Remarks, CCA 2016 Annual Convention, Seattle, WA, at 2 (Sept. 21, 2016) ("The FCC has already established a shot clock within which local governments are supposed to review wireless infrastructure applications. But if a city doesn't process the application in that timeframe, a company's only remedy is to file a lawsuit. We should give our shot clock some teeth by adopting a 'deemed-grant' remedy, so that a city's inaction lets that company proceed").

[143] In the alternative, and at a minimum, the Commission should declare, consistent with the majority of courts, that the only possible remedy for a violation of Section 332(c)(7)(B) that comports with the language and policy of the statute is an immediate order requiring the local government to grant the application. Without such a minimum mandatory remedy, the language and purpose of the 1996 Act will not be achieved. *See, e.g., Cellular Tel. Co. v. Town of Oyster Bay,* 166 F.3d 490, 497 (2d Cir. 1999); *Wireless Income Props., LLC v. City of Chattanooga,* 403 F.3d 392, 400 (6th Cir. 2005); *Omnipoint Commc'ns., Inc. v. Town of LaGrange*, 658 F. Supp. 2d 539, 561-62 (S.D.N.Y. 2009) (injunction, rather than remand, was appropriate remedy where applicant's application was "bounced back-and-forth like a ping pong ball" between zoning board and planning board); *Verizon Wireless (VAW) LLC v. Douglas Cty. Bd. of Cty. Comm'rs,* 544 F. Supp. 2d 1218, 1252 (D. Kan. 2008) ("Because of the extensive delay that has already occurred in this case, the Court finds that remand for further proceedings is not appropriate."); *Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 225 (S.D.N.Y. 2004) (ordering immediate injunctive relief to avoid application becoming a "self-perpetuating, endless odyssey") (citation omitted); *Omnipoint Commc'ns, Inc. v. Planning & Zoning Comm'n of Wallingford*, 83 F. Supp. 2d 306, 312 (D. Conn. 2000) (finding that "remand [to board] would not be appropriate as that would create further delay especially in light of the multiple hearings that have already spanned many months" during the process); *Primeco Personal Commc'ns Ltd. P'ship v. Lake Cty.*, No. 97-208-CIV-OC-10B, 1998 WL 565036, at *14 (M.D. Fla. July 20, 1998).

As discussed above, there are several fundamental problems being encountered in the deployment of small wireless facilities in the public rights-of-way. First, local governments are discriminating against the new technology deployment by imposing fees on small wireless facility deployments that are not imposed on other telecommunications facilities in the public rights-of-way or seeking to impose radically higher fees only on small wireless facilities. In addition, many local governments are seeking to profit from small wireless facility deployments by imposing fees that are unrelated to the local government's costs of managing the use of the public rights-of-way. And overwhelmingly, the fees sought by local governments are not publicly available in advance. Rather, they are frequently ad hoc or the result of cities seeking to obtain the highest fee they can in a given situation. As demonstrated below, in each of those cases, the local governments' demands are effectively prohibiting the provision of telecommunications services, and are not within the narrow authority reserved to local governments in Section 253(c).

1. The Commission Should Declare That Municipal Fees for Use of the Public Right-of-Way Must Be Nondiscriminatory

As discussed above, the Commission as well as numerous courts have recognized that municipal fee demands that are imposed on one set of providers but not others—in other words, that impose greater costs on one group—effectively prohibit the provision of telecommunications service by materially inhibiting or limiting the ability of those companies to compete in a fair and balanced regulatory environment. In the case of discriminatory fee impositions, that effective prohibition of service is easily identified, and should be made explicit by the Commission.

In the *Public Notice*, the Commission asks whether fees that exceed those imposed on other providers for similar access to the rights-of-way conflict with the requirement in Section

253(c) that such fees be "competitively neutral and nondiscriminatory."[144] The answer is that such fees clearly are not competitively neutral and nondiscriminatory and therefore violate both Section 253(a) and Section 253(c).

As a threshold matter, in the *Public Notice*, the Commission uses language regarding fees for "similar" access to the public rights-of-way. Ultimately, Section 253(c) makes no reference to "similar" access to the public rights-of-way, and the Commission should not incorporate such language. However, even to the extent the Commission is merely recognizing, for example, that regulations governing underground installation of lines may inherently be different than regulations managing attachment of equipment to existing poles, the Commission should make clear that "similar" access cannot be narrowly interpreted. The Commission should emphasize that Section 253 and the 1996 Act as a whole are technology neutral, and different fees cannot be justified based on narrow characterizations of certain equipment or its technology.

Use of the public rights-of-way that is "similar" to use for small wireless facilities means deployment of *any equipment* in the public rights-of-way. As discussed above, the small wireless equipment and facilities being deployed are similar in size and appearance to other telecommunications and utility equipment. Indeed, in some cases, small wireless facilities use the exact same equipment cabinet as "non-wireless" providers, and in some cases, the small wireless facility equipment is smaller than equipment installed by other communications or utility right-of-way pole occupants.[145]Accordingly, there is no justification for municipal fees

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[144] *Public Notice*, 31 FCC Rcd at 13373.

[145] *See, e.g.*, *City of Newport News*, 2016 WL 4205355, at *8 (recognizing that equipment installed by telephone, electric and cable companies "is often similar in size and sometimes larger than" small wireless facility equipment attached to utility poles); *T-Mobile West Corp. v. City & Cty. of San Francisco*, No. CGC-11-510703, at 9.

imposed on "wireless" equipment differently solely because of the inclusion of wireless technologies. There is no difference in the impact on the public rights-of-way of small wireless facility equipment that is similar in size to other communications or utility equipment on poles. And there is no greater management burden required of the local government. To the extent that local governments claim there are greater management costs, it may be because those local governments have imposed uniquely burdensome regulations only on wireless equipment in the rights-of-way.

In particular, the Commission should explicitly declare that Section 253 prohibits local governments from discriminating against wireless equipment, and reject the theory that a local government may discriminate in such a manner if it regulates all "wireless" installations the same. Arguments that Section 253 allows fees that treat one narrowly defined group of providers the same have been rejected repeatedly by the Commission and the courts.[146] Indeed, the Commission filed an *amicus* brief before the Second Circuit in *White Plains* in which it stated that "a local telephone franchise fee that applies only to new entrants and not to incumbent local exchange carriers is not competitively neutral and nondiscriminatory under section 253(c)."[147] In its *amicus* brief, the Commission concluded that "the five percent gross revenue fee impose[d] on TCG [is] an additional cost of doing business in the City that is not imposed on its incumbent competitor . . . that inevitably puts TCG at a pricing disadvantage in relation to Verizon."[148]

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[146] *RT Commc'ns,* 201 F.3d at 1269 (rejecting argument that regulation was "competitively neutral" because it treated all *new* entrants the same); *TCI Cablevision*, 12 FCC Rcd at 21443 ¶ 108 ("Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory") (emphasis added).

[147] FCC Br. in *City of White Plains*, 2001 WL 34355501, at *8.

[148] *Id.* at *15-16.

2. The Commission Should Declare That Right-of-Way Fees Are Limited to Recovering the Local Government's Cost of Managing the Occupant's Use of the Right-of-Way

In the *Public Notice*, the Commission also asks whether the phrase in Section 253(c) "fair and reasonable compensation" should be interpreted to mean that right-of-way fees are limited to recovering the local government's reasonable cost of managing the provider's use of the rights-of-way.[149] There is significant legal and policy support for that interpretation, and as the discussion above and other data in the record demonstrate, there is a significant need for the Commission to declare that even if imposed in a non-discriminatory manner, Section 253(c) limits local right-of-way fees to cost recovery. Any other interpretation threatens the deployment of advanced telecommunications technologies and services.

As articulated by the First Circuit and Second Circuit, as well as the Ninth Circuit in *City of Auburn*, and several district courts, the rationale for limiting local government fees to recovery of their actual cost of managing the telecommunications provider's use of the public rights-of-way stems from (1) from the language of Section 253, which limits municipalities to matters concerning physical occupation of the rights-of-way, and (2) because Section 253(c) requires fees to be "reasonable" to prevent local governments seeking to profit from their monopoly control over the rights-of-way.

In *White Plains*, the Second Circuit explained that "Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns."[150] The First Circuit reiterated that holding in *Puerto Rico Telephone*.[151] In *City of Auburn*, the court concluded that

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[149] *Public Notice*, 31 FCC Rcd at 13373.

[150] 305 F.3d at 79.

[151] 450 F.3d at 22 (quoting *White Plains*, 305 F.3d at 79).

Section 253 of the Act requires that non-tax franchise fees be limited to the municipalities' actual costs incurred in managing the rights-of-way.[152] In addition, the court held that Section 253 prohibits municipalities from requiring providers to give free fiber and conduit capacity.[153] Numerous district courts have also adopted that standard.[154]

The limitation to costs is supported by the legislative history of Section 253. Senator Dianne Feinstein, during the floor debate on Section 253(c), offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including "require a company to pay *fees to recover an appropriate share of the increased street repair and paving costs* that result from repeated excavation."[155] Congress intended to preserve the ability of cities to recover the costs directly created by managing the new occupation, not to allow cities to profit from new technologies and competition.

The Commission has also previously articulated the concern that Section 253(c) prohibits cities from profiting from the public rights-of-way. In its *Amicus Curiae* brief to the Second Circuit in *White Plains* the Commission explained that "there also is a serious question whether a gross revenues based fee is 'fair and reasonable compensation . . . for use of public rights of way'" because "'a fee that does more than make a municipality whole is not compensatory in the

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[152] 260 F.3d at 1178.

[153] *Id.* at 1179.

[154] *See, e.g.*, *Bell Atl.-Md., Inc. v. Prince George's Cty.*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000), *on remand*, 155 F. Supp. 2d 465 (D. Md. 2001); *PECO Energy Co. v. Twp. of Haverford*, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999); *XO Mo., Inc. v. City of Md. Heights*, 256 F. Supp. 2d 987 (E.D. Mo. 2003).

[155] 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from Office of City Attorney, City and County of San Francisco)) (emphasis added); *see also Classic Tel., Inc.*, 11 FCC Rcd 13082, 13103 ¶ 39 (1996).

literal sense, and risks becoming an economic barrier to entry.'"[156] Indeed, the Commission went further, stating that "there is a vast difference between a regime in which fees vary in dollar amount among local exchange carriers *depending on the costs each inflicts*, and the City's blanket exemption of Verizon from rights-of-way fees based only on its position as an incumbent. ***The former, which is what Congress intended section 253(c) to permit*** . . .."[157]

Notably, several states also have adopted statutes specifically limiting local governments to recovery of their costs caused by a telecommunications provider's use of the rights-of-way.[158] Such statutes demonstrate both the importance of preventing municipal overreach and also that limiting local government fees to cost recovery is entirely reasonable.

The Commission should declare that Section 253(c) prohibits fees that are not directly related to the costs caused to the local government. Any other interpretation of Section 253(c) is contrary to the language and intent of Section 253, and threatens to prevent the deployment of wireless services and technologies as a vibrant competitive option for consumers. As the courts in *Puerto Rico Telephone*, *City of White Plains*, and *City of Auburn* recognized, Section 253 must be interpreted to limit local government fees because there is no "market" for the public rights-of-way. It is controlled solely by the local government. Accordingly, there are no market alternatives to otherwise regulate the rates that municipalities can impose. Compensation under Section 253(a) and 253(c) must be limited to recoupment of cost, not exploitation of the fact that there are no alternative markets.

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[156] FCC Br. in *City of White Plains*, 2001 WL 34355501, at *14 n.7 (quoting *New Jersey Payphone Ass'n, Inc. v. Town of W. N.Y.*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001)).

[157] *Id.* at 14 (emphasis added).

[158] CAL. GOV'T CODE 50030; MINN. STAT. §§ 237.163, 257.162; UTAH CODE ANN. §§ 72-7-102, 10-1-46.

The Commission should also address the problem of access to municipally-owned poles. As discussed above, in some cases, the only poles in the public rights-of-way in an area are municipally-owned (street light or traffic signal poles for example), and the local government prohibits installation of any other poles in the area. In such situations, for small wireless facilities to be deployed requires access to the municipally-owned poles. Denying access to those poles, either explicitly or effectively by imposition of unreasonably high fees, is a local government requirement that has the effect of prohibiting the provision of telecommunications service that is not fair and reasonable. Indeed, these are perfect examples of municipal profiteering. The local government will declare an area to be "underground only," with the only above-ground poles in the rights-of-way owned by the municipality. When a provider asks to use the municipal poles, they are presented with annual fees of thousands of dollars per year. When the provider says it would be more economic to install its own pole—even a pole designed to replicate the existing municipal poles—the local government says that is not allowed, the small wireless facility must either use the municipal poles, at the demanded annual rate, or not be able to deploy in that area.[159]

3. The Commission Should Emphasize the Need for Local Government Fees to Be Publicly Disclosed in Advance

A critical component of the Section 253(c) limit on local government fees is the requirement that such fees also be publicly disclosed in advance. Section 253(c) provides that nothing in the section affects the authority of local governments to impose fair and reasonable,

[159] *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063, at *16-18 (S.D.N.Y. 2004) (holding that City's requirements and fees for use of city-owned poles "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy").

competitively neutral and nondiscriminatory fees, "if the compensation required is publicly disclosed by such government."[160] The statute requires that the fees be disclosed in advance.[161]

This is an explicit statutory requirement that cannot be ignored. Indeed, it further emphasizes that Section 253(c) limits local governments to cost-recovery fees. The statute envisions standard, published fee schedules. That requirement cannot be satisfied in situations where local governments seek to negotiate with each new company for each new deployment, or where local government fees are unknown—even by the local government—until the local government makes an arbitrary evaluation of what it can charge based on the specifics of the equipment deployed. In *Township of Haverford*, the court held that the Township's Ordinance, which provided that telecommunications providers must pay a fee, but did not publish a schedule of the amounts of the fees, violated Section 253(c).[162] The court also held that the Township's failure to publish a schedule of fees rendered the court unable to determine if the Township had complied with Section 253(c)'s requirement that compensation be imposed on a "competitively neutral and nondiscriminatory basis."[163] Ultimately, the Court recognized that the Township's failure to publish the fee schedule, in and of itself, created a barrier to entry because of the significant uncertainty.[164] Providers cannot plan a complicated and expensive network deployment, and price it for customers, only to then be faced with unpredictable, unreasonable municipal fees. Thus, undisclosed fees are not only an explicit violation of Section 253(c), they also have the effect of prohibiting deployment altogether.

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[160] 47 U.S.C. § 253(c).

[161] *Township of Haverford*, 1999 WL 1240941, at *7.

[162] *Id.*

[163] *Id.*

[164] *Id.* at *8-9.

Accordingly, the Commission should clarify and emphasize the law on this point to promote the rapid deployment of advanced telecommunications technologies and services.

IV. CONCLUSION

The deployment of wireless networks and services is a critical element of America's present and future economy. But the deregulatory, procompetitive intention of the 1996 Act is far too often being thwarted by an inconsistent and burdensome patchwork of parochial local regulations. The Commission should take this opportunity to issue a declaratory ruling that will reinvigorate the meaning and purpose of Section 253 and, in so doing, further fulfill the Commission's mandate to promote the rapid deployment of broadband.

Respectfully submitted,

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